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IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children, REBECCA GONZALES, KATHERYN GONZALES, and LESLIE GONZALES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF NATIONAL BLACK POLICE ASSOCIATION, NATIONAL ASSOCIATION OF BLACK LAW ENFORCEMENT OFFICERS, WOMEN IN FEDERAL LAW ENFORCEMENT, THE NATIONAL CENTER FOR WOMEN & POLICING, AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF THE AMICI CURIAE

The undersigned amici curiae are the National Black Police Association, National Association of Black Law Enforcement Officers, Women in Federal Law Enforcement, the National Center for Women & Policing, and Americans for Effective Law Enforcement, Inc.[1] Amici are law enforcement membership and educational organizations. They share an interest in the outcome of this case because they are committed to improving police responses to domestic violence, and believe that, if the allegations in this case are correct, the conduct of the Castle Rock Police Department fell far beneath acceptable police standards. Amici seek to inform this Court about the widely recognized and adopted standard practices utilized by police around the country in responding to domestic violence, and to emphasize that the constitutional procedures adopted here would establish only a minimal floor that is far less burdensome than the "best practices" already typically employed by law enforcement in domestic violence cases.

STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides, in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Relevant state statutes are included in the appendix to this brief. *See* App. 1a-4a.

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[1] Letters from the parties providing consent were submitted to the Clerk of the Court. Pursuant to Rule 37.6, amici state that no counsel for any party has authored any part of this brief, and no person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. Respondent does not seek to relitigate *DeShaney*, which was a substantive due process case rejecting a fundamental constitutional right to protection. Hers is a procedural due process claim of the sort that *DeShaney* expressly distinguished. Petitioner's assertion that *DeShaney* precludes her claim would mean that states cannot create benefits that are entitled to constitutional due process protection.

2. As a protected person under a Colorado domestic violence protection order, Respondent had a legitimate entitlement to police enforcement of the order. Colorado law explicitly dictates that police employ "every reasonable means to enforce" domestic violence protection orders, and the legislative intent confirms the mandatory nature of the statutory requirement. The protection order made the statutory benefit concrete and personal to Respondent. She was entitled (and reasonably expected) to rely on the promise of enforcement.

3. Respondent's enforcement right is sufficiently certain to create a legitimate entitlement. The Colorado statute eliminates meaningful police discretion, and what remains is no more than this Court has repeatedly allowed while still finding an entitlement. Petitioner's suggestion that the Constitution cannot require more procedures than the State itself provides rehashes an argument this Court has repeatedly rejected.

4. The police ignored Respondent and denied her repeated pleas for enforcement without reasoned consideration. No matter how appropriate process is defined, she was not provided it.

5. The Respondent's interest, the risk of erroneous deprivation and value of additional process, and the government's interest, all militate in favor of establishing a procedural floor for these police decisions. Implementing such procedures would not detrimentally affect law enforcement. Current police practices in domestic violence cases far exceed the *en banc* court's constitutional minimum.

ARGUMENT

I. *DESHANEY* DOES NOT FORECLOSE RESPONDENT'S PROCEDURAL DUE PROCESS CLAIM.

A. The Due Process Claim At Issue Is Procedural, Not Substantive In Nature.

Petitioner seeks to conflate substantive and procedural due process by observing that "the alleged procedural failing derives only from the lack of a favorable result, and the only curative procedural remedy would presumably be one that guaranteed Ms. Gonzales a different result." *See* Pet Br. 13. This observation is a mere truism because all due process claims, by definition, require an allegation that the state denied life, liberty, or property.[2] The difference between substantive and procedural claims is not in whether the plaintiff alleges that she was deprived of a substantive benefit (to have an injury, she always must). Rather, it is in whether the plaintiff alleges that the denial is caused by the failure of the state to employ adequate procedures to guard against

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[2] Were Petitioner correct, every complaint alleging a due process violation as a result of the denial of a substantive benefit would be a *de facto* substantive due process complaint, and no plaintiff could state a proper claim for denial of procedural due process. *See* U.S. Const. amend. XIV, § 1 (state may not "*deprive* any person of life, liberty, or property, without due process of law.") (emphasis added).

erroneous deprivation (procedural due process), or the failure of the state to provide an adequate justification for its action (substantive due process).

To be sure, Respondent believes that her pleas for enforcement should have been heeded and the murder of her three girls averted. But at base she claims that Petitioner ignored her requests for assistance. In fact, she alleges that Petitioner's policy and practice is to ignore requests like hers without employing any procedural protections at all. PA 129a. Had minimal fair process been employed, she would not have been erroneously deprived of the enforcement to which she was entitled. She stated a claim for denial of procedural due process that is separate entirely from her dismissed claim for denial of substantive due process.

B. States Have Power Under *DeShaney* To Create Property Rights In Police Protection.

Petitioner asks this Court to carve out a special exception to the states' historic ability to create property rights, asserting that *DeShaney* precludes states from "*ever* recognizing a non-traditional *Roth*-type property interest in police enforcement procedures." Pet. Br. 12. Petitioner's position is contradicted by the United States, which recognizes that "courts should recognize an entitlement to enforcement ... when the legislature has clearly indicated that to be its intent," U.S. Br. 9, and is unsupportable under *DeShaney* and this Court's due process jurisprudence.

States are always free to provide their citizens whatever benefits they choose and to create whatever property rights that follow. *See Bishop v. Wood*, 426 U.S. 341, 344 (1976) ("[T]he sufficiency of the claim of entitlement must be decided by reference to state law."); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property rights may "stem from an independent source such as state law"). This Court's

jurisprudence is replete with examples of states creating protected property and liberty interests in rights that, like police protection, do not spring from the Constitution. *See Vitek v. Jones*, 445 U.S. 480, 488 (1980) ("There is no 'constitutional or inherent right to parole,' but once a State grants a prisoner the conditional liberty properly dependent on the observance of special parole restrictions, due process protections attach to the decision to revolve parole.") (citations omitted). Indeed, 30 years ago, this Court "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Roth*, 408 U.S. at 571.

Should they choose to do so, the states are no less able to create property rights in police enforcement than they are in previously recognized benefits. Police enforcement of domestic violence protection orders is at least as compelling as other so-called "*Roth*-type" property interests. *See* Br. of *Amici Curiae* Nat'l Network to End Domestic Violence ("NNEDV") at 7, 19-20, 25-29. The fact that police protection is a critical service of civil society that is monopolized by the State suggests that police protection should be more, not less, subject to the requirements of procedural due process. "[D]ue process of law ... command[s] that public agencies ... such as the police, which possesses broad and virtually monopolistic powers to use force and restraint upon the citizenry – act according to uniform, visible, and regular rules of law. When the extraordinary powers of the police are used unconstrainedly – that is, in the absence of such rules – they are used arbitrarily in a constitutional sense, in violation of due process" 1 ABA Standards for Criminal Justice, 1-4.5, comment. 1-124 (2d ed. 1980 & Supp. 1986) (quoting *Amsterdam*, The Supreme Court and the Rights of Suspects in Criminal Cases). *See Boddie v. Connecticut*, 401 U.S. 371 (1971) (state monopolization of process for divorce requires it to make

process accessible to all); *Archie v. Racine*, 847 F.2d 1211 (7th Cir. 1988) (*en banc*) ("When a state cuts off sources of private aid, it must provide replacement protection"), *cert. denied*, 489 U.S. 1065, 1223 (1989); *Dawson v. Milwaukee Hous. Auth.*, 930 F.2d 1283, 1284 (7th Cir. 1991) (citing *Archie* for proposition that "state may constrain [liberty] indirectly as well as directly – by suppressing private alternatives as well as by preventing self-help").

Certainly, *DeShaney* does not restrain state power.[3] *DeShaney* held only that the Constitution does not "impose on state and local governments an affirmative obligation to prevent private-party violence." *DeShaney v. Winnebego Cnty Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). And as even Petitioner is forced to concede, Pet. Br. 15, *DeShaney* explicitly contemplated that a state might afford its citizens "an 'entitlement' to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation under ... *Roth*." *DeShaney*, 489 U.S. at 195 n.2.

[3] Petitioner relies on two out-of-context quotations from legal commentators, both of whom support Respondent. *See* Pet. Br. 15-16 (citing Profs. Jones and Strauss). Jones concludes that plaintiffs who "were the holders of valid state orders of protection the police refused to enforce without first offering them procedural due process in the form of predeprivation notice and a hearing on the refusal, ... may have a viable procedural due process claim." *See* Jones, *Battered Spouses' Section 1983 Damage Actions Against the Unresponsive Police After* DeShaney, 93 W.Va. L. Rev. 251, 351 (1991) . Strauss, an outspoken *DeShaney* critic, recognized that its "limited" holding "left open the possibility that persons ... might recover under the procedural components if they could show that state law created an 'entitlement' to receive protective services in accordance with the terms of [a] statute." *See* Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 Sup. Ct. Rev. 53, 56 (1989) (quoting *DeShaney*, 489 U.S. at 195 n.2).

II. COLORADO VESTED RESPONDENT WITH A PROPERTY INTEREST IN ENFORCEMENT OF HER PROTECTION ORDER.

The state of Colorado conferred upon Respondent a protected property interest in police enforcement of her protection order. The interest originated in Colorado law -- which requires that police enforce domestic violence protection orders -- and was bestowed upon Respondent individually when a Colorado court determined that her estranged husband posed a threat to her and her children and issued to her a protection order with explicit instructions to police and notice to her that it must be enforced.

A person obtains a property interest in a state benefit when she has "a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. The touchstone of entitlement is mutual expectation. *Kentucky Dep't of Corrs. v. Thompson*, 490 U.S. 454, 465 (1989) ("objective expectation"); *Vitek*, 445 U.S. at 489 ("justifiable expectations"); *see also Roth*, 408 U.S. at 577 ("more than a unilateral expectation"). States may create entitlements for a particular class of individuals if they define benefits and purposefully guide their officials to distribute those benefits to the class. *See Roth*, 408 U.S. at 577; *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). States do not create entitlements if they merely allow officials to award or deny benefits "for whatever reason or for no reason at all." *Olim v. Wakinekoba*, 461 U.S. 238 (1983) (quotation marks and citation omitted); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543-44 & n.9 (1985) (recognizing property interest despite discretion).

A. Colorado Law Explicitly Mandates Enforcement of Protection Orders.

Colorado law authorizes courts to issue protection orders in family cases and unambiguously requires state police to

enforce them. Respondent obtained her protection order pursuant to Section 14-10-108(2)(b)-(c) of the Uniform Dissolution of Marriage Act, which authorizes state courts to award an order "enjoining a party from molesting or disturbing the peace of the other party or of any child [or] excluding a party from the family home ... upon a showing that physical or emotional harm would otherwise result." Colo. Rev. Stat. § 14-10-108(2)(b)-(c).

Once the state court awarded the protection order to Respondent and the order was served on Mr. Gonzales, its enforcement was made mandatory by Section 18-6-803.5. *See id.* § 14-10-109 ("the duties of police officers enforcing orders issued pursuant to ... 14-10-108 shall be in accordance with section 18-6-803.5"). That section requires that "[a] peace officer *shall* use *every* reasonable means to enforce a restraining order." *See id.* § 18-6-803.5(a) (emphasis added).

Petitioner and the United States contend that, despite the express terms of the statute, it does not create any mandatory benefit. This contention is unavailing for several reasons.

First, Petitioner and its supporting amici wrongly frame this case as concerning an entitlement to "arrest." U.S. Br. 15, *et seq.* In fact, Respondent's claim is for "every reasonable means to enforce" the protection order, PA 128a. "Enforcement," as used in the Colorado statute, may include arrest, and often must. But it may alternatively or additionally include obtaining a warrant or securing children.[4] While

[4] Police commonly understand that they play a critical protective role in domestic violence cases that is only partially defined by the power to arrest. *Cf. e.g.*, Int'l Ass'n of Chiefs of Police ("IACP"), *Model Policy* (rev. 1997) ("IACP Policy") (App. B 9a) (requiring officers to provide assistance to victims, batterers, and children, including to "[e]nsure the safety of the children"). The IACP Policy treats arrest as non-mandatory, but treats the obligation to ensure the safety of children and parties as

(continued...)

amici believe an arrest was in fact mandated here, this Court need not decide whether Respondent had a protected property interest in an arrest *per se*. If, as the *en banc* court of appeals found, the state created an entitlement to "enforcement," regardless of the means chosen to effect it, she stated a claim.

Putting aside the specific duty to *arrest*, Petitioner and the United States concede that under the plain meaning of the statute, some *enforcement* is required. *See* Pet. Br. 28 (dismissing "shall arrest" language because seen as inconsistent with every "'reasonable means' requirement of the first sentence"); U.S. Br. 15 (reading arrest provision in context of "*command* that immediately precedes it, which provides that police 'shall use every reasonable means to enforce' a protection order") (emphasis altered).

Second, Petitioner and the United States ignore Colorado precedent regarding the meaning of the word "shall" in a statute. *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1982) ("shall" has a "mandatory connotation"); *People v. Clark*, 654 P.2d 847, 848 (Colo. 1982). Where the use of the mandatory "shall" is unambiguous, as it is here, the statute is presumed to be mandatory. *Morgan v. Genesee Co., LLC*, 86 P.3d 388, 393 (Colo. 2004) (applying presumption under Colorado law that "shall" is mandatory). Petitioner argues that this presumption is overcome on a showing that "the context indicates otherwise." Pet. Br. 29-30 (citing *DiMarco v. Department of Rev.*, 857 P.2d 1349, 1352 (Colo. App.

mandatory. *Compare id.* 8a (officers "should" arrest), *with id.* 9a ("officers are required to assist ... the parties [and] ensure the safety of children"). Excerpts of various police policies, including the IACP Policy, are included in the appendices to this brief ("App."). Due to the number of the cited policies, amici have included only five in the appendix; most, however, are available in their entirety via the internet; the remainder are in the possession of counsel.

1993)). But in this context, Petitioner has made no such showing, nor can it. *See* Hearing on H.B. 1253 Before the House Judiciary Comm. ("Hearings"), 1994 Leg. Colo. 1994) (statement of Rep. Kerns, sponsor) ("The police must make probable cause arrests."); *cf.* Br. of *Amici Curiae* Nat'l Coalition Against Domestic Violence ("NCADV") at IV (domestic violence mandatory arrest statutes are intended to mandate arrest and terminate discretion).

Third, the legislative history of the statute confirms that the enforcement provisions are mandatory. *See Public Citizen v. United States*, 491 U.S. 440, 454-55 (1989) (referring to legislative history); *Grant v. People*, 48 P.3d 543, 546-47 (Colo. 2002). The Colorado legislature adopted the mandatory enforcement statute specifically to protect women and children (such as Respondent) against abusive spouses and to remedy the police's long history of refusing to intervene on behalf of victims of domestic violence. *See* PA 25a ("The Colorado legislature clearly wanted to alter the fact that the police were not enforcing domestic abuse restraining orders."). In 1994, when the mandatory enforcement provisions were enacted, it was understood that domestic violence was "the single largest cause of injury to women in the United States, more common than auto accidents, muggings, and rapes combined." *See* Fuller & Stansberry, *1994 Legislature Strengthens Domestic Violence Protection Orders*, 23 Colo. Law. 2327 (Oct. 1994); Colo. Rev. Stat. § 18-6-801.5 (finding that "domestic violence is frequently cyclical in nature, involves patterns of abuse, and can consist of harm with escalating levels of seriousness"). Colorado's criminal justice system was seen by the statutes' primary sponsors in the legislature as inconsistent and flawed. *See* Hearings, *supra* (statement of Rep. DeGette, sponsor) (Colorado's "domestic violence laws are lagging behind"); *id.* (statement of Rep. Kerns, sponsor) ("[T]he entire criminal justice system must act in a consistent

manner, which does not now occur."). The legislature "wanted to put together a bill that would really attack the domestic violence problems ... and that is that the perpetrator has to be held accountable for his actions, and that the victim needs to be made to feel safe." *Id.* The legislature's solution, among other things, was to *mandate* enforcement of protection orders, thereby purposefully and intentionally empowering protected parties with the expectation of safety and statutorily reversing the history of police indifference. *See id.* ("The police must make probable cause arrests. The prosecutors must prosecute every case."); Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but is it Enough?*, 1996 U. Ill. L. Rev. 533, 541-542 (1996) (noting statutes only *permitting* arrest had little effect, leading to mandatory statutes); IACP National Law Enforcement Pol'y Ctr., *Domestic Violence Concepts and Issues Paper* (Rev. 1996) ("IACP Concept Paper") (App. C 23a) (discussing differences between mandatory and preferred arrest statutes).

In short, if the Colorado domestic violence statute, with its plain meaning and clear legislative purpose, does not mandate enforcement, it is difficult to imagine how a state legislature could ever do so.

B. The Protection Order Personally Defined Respondent's Enforcement Right.

Respondent had a property right in enforcement because the Colorado protection order personally defined for her an otherwise general right of police enforcement. *See Siddle v. City of Cambridge*, 761 F. Supp. 503, 509 (S.D. Ohio 1991) ("[W]hen a protective order exists, as in this case, there is a governmental duty to protect the individual."); *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257, 264-65 (E.D. Pa. 1990) (finding that ordinarily "the duty to protect is owed by

a municipality to the citizenry as a whole, rather to any individual," but "the orders of court create a property interest in police enforcement that is cognizable under *Roth*"). "The case for due process protection grows stronger as the identity of the persons affected by a governmental choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual comes more determinately within the decisionmaker's purview." Tribe, *American Constitutional Law* § 10-7, 503-04 (1978).

In arguing that the order is not binding on police, Petitioner and the United States misapprehend its import, which was to take the ephemeral rights described in the statute and to make them concretely Respondent's. *See Siddle*, 761 F. Supp. at 509 (explaining effect of order); *Coffman*, 739 F. Supp. at 264-65 (same).

Petitioner and the United States wrongly assume that the order had only the effect of an injunction. The police are required to enforce the order, not because the protection order enjoined them, but because the *statute* required its enforcement. The statutory summary on the order's backside was not an injunction; it simply provided supplementary notice to Respondent and to police that the statute must be heeded. Respondent was entitled to rely on the order, the essence of which was enforcement. *See Roth*, 408 U.S. at 577 ("[I]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."). Indeed, both the police and the courts regularly instruct victims of domestic violence that protection orders will entitle them to increased police protection, and victims typically rely on this expectation. *See* Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* 161 (NEU Press 1999).

The Respondent's protection order evinced a judicial determination that she was within the class of persons entitled to receive the statutory benefit of enforcement. Once that individualized determination was made, it could not be withdrawn without adequate procedures. Thus, the cases cited by Petitioner and the United States are distinguishable. In neither *Doe by Fein v. District of Columbia*, 93 F.3d 861 (D.C. Cir. 1996), *Doe by Nelson v. Milwaukee Cnty*, 903 F.2d 499 (7th Cir. 1990), nor *Jones v. Union Cnty*, 296 F.3d 417 (6th Cir. 2002) was the court asked to determine whether a plaintiff had a property right in a protection order. Rather, the courts held only that their plaintiffs did not have a right "in the rare air" to government services, including protection under a general statute.[5]

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[5] In *Doe by Nelson*, for example, the court determined that a minor plaintiff could not base a procedural due process claim on the state's failure to investigate a child abuse complaint within 24 hours of its filing, as state law required. 903 F.2d at 502. Unlike in this case, where Respondent "securely and durably" holds the protective order and clearly benefits from its enforcement, the *Doe by Nelson* court reasoned that there was no clear beneficiary for the investigation. *Id.* at 504 ("it is impossible to say that the right to an investigation of a report of child abuse 'securely and durably' belongs to anyone at all"). These cases also demonstrate that the enforcement requirement here directs a substantive benefit, and not a precatory procedural guideline as Petitioner and the United States suggest. Pet. Br. 30-32; U.S. Br. 21. The plaintiff in *Doe by Nelson* claimed an entitlement to investigatory procedures on a timetable that was intended only to guide the internal processes of government and on which she did not rely. The *Doe by Nelson* court rejected the claim, in part, because the contingent derivative benefits that may derive from an investigation were too indirect. *Doe by Nelson*, 903 F.2d at 504. Here, by contrast, enforcement of the protective order is not a procedure, but a substantive result that confers a direct benefit relied on by the protected party.

C. Respondent's Property Interest Is Not Defeated by the Police's Limited Discretion.

Petitioner (at 25-30) and the United States (at 15-22) argue that police retain significant discretion under the statute for three reasons: 1) police discretion cannot be eliminated even by statutory mandates; 2) the statute itself contemplates substantial police discretion; and 3) a probable cause determination requires some discretion. These arguments vastly overstate whatever discretion remains in this purposefully mandatory statute, and underestimate the amount of discretion needed to defeat an entitlement.

First, the idea that police always retain discretion derives largely from treatises discussing only traditional criminal statutes using "shall."[6] Whether or not there is any validity to this notion in that context,[7] it cannot possibly apply to domestic violence enforcement statutes such as Colorado's, which were enacted for the specific purpose of eliminating the police's infamous history of abusing their discretion by failing to enforce protection orders. *See* PA 25a ("The Colorado legislature clearly wanted to alter the fact that the police were not enforcing domestic abuse restraining

[6] The Petitioner notes Kenneth Culp Davis's theories of police discretion, cited by Judge Hartz. PA 92a-93a. While Davis does not think that police discretion can be entirely eliminated, he argues that discretion "should be confined, structured, and checked" because "discretion that is checked is obviously less likely to be arbitrary than discretion that is unchecked." Davis, *Police Discretion* 144-45 (West 1975). Davis's book predates domestic violence mandatory enforcement statutes; thus, it does not respond to statutes, such as this one, that purposefully eliminate discretion that has been systematically abused.

[7] LaFave acknowledges: "[a]rrest statutes are commonly drafted in mandatory terms, and on the infrequent occasions when courts are called upon to speak to the question they typically assert that the police lack authority not to invoke the criminal process when the evidence is sufficient to arrest." LaFave & Israel, *Crim. Procedure* 625 (2d ed. 1992).

orders."); *cf. Nearing v. Weaver*, 670 P.2d 137, 142 (Or. 1983) (describing purpose of Oregon mandatory enforcement statute as "to negate any discretion...in enforcing restraining orders issued under Oregon's Abuse Prevention Act"). If the legislative command is to mean anything, it is that the Colorado police no longer have discretion regarding whether to enforce protection orders.

Second, Petitioner conflates the Colorado statute's various *means* (which include arrest, warrant, etc.) with its singular *end* (which in accordance with the plain language and legislative intent, is unambiguously to enforce protection orders by "every reasonable means"). Petitioner argues that the phrase "every reasonable means" contemplates discretion and that the police must use discretion to decline arrests when violations are *de minimis*. *See* Pet. Br. 28 ("step back" order in response to restrained person stepping one yard inside restricted zone). In objectively *de minimis* situations, arrest may or may not be required. But that does not dilute the absolute requirement of "*enforcement*," and the word "every" which precedes it makes clear that "enforcement" is absolutely required. In short, whatever discretion the police possess with respect to the statute is constrained to selecting the means but not the end of enforcement.[8] This is directly

[8] Petitioner further argues that because two options -- an arrest and a warrant for arrest -- may be construed as "reasonable means to enforce," enforcement is not a "particular" enough result to create a property interest. Pet. Br. 29 (citing *Thompson*, *Olim*, and *Sandin*). This argument misconstrues the cases. The particularity rule Petitioner seeks to impose is not the "holding" in *Sandin* as Petitioner represents, but rather the "undesirable" *Hewitt* methodology (followed by *Thompson* and *Olim*) that *Sandin* expressly rejects. *See Sandin v. Connor*, 515 U.S. 472, 482, 483 n.5 (1995) (citing *Hewitt v. Helms*, 482 U.S. 755 (1987)). Moreover, even before it was abandoned, the *Hewitt* methodology was typically employed only in prison liberty cases, where it wrongly "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." *Id.* at 481.

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analogous to cases involving property rights (e.g. public education), where discretion to choose precise means (curricula) are left to decisionmakers (individual teachers), but the entitlement (education) is required. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 573-74 (1975).

Every court we are aware of that has examined the effect of a court order awarded pursuant to a mandatory enforcement statute has agreed that the combination creates a property interest, even if discretion remains to determine "reasonable means." *See Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476-77 (6th Cir.), *cert. denied*, 498 U.S. 867 (1990); *Siddle*, 761 F. Supp. at 509; *Coffman*, 739 F. Supp. at 257, 263-66; *Burella v. City of Philadelphia*, No. 00-884, 2003 U.S. Dist. LEXIS 25170 (E.D. Pa. Dec. 17, 2003).

Third, contrary to Petitioner's claim, the probable cause determination, while sometimes requiring the exercise of limited discretion, does not undermine the entitlement. This Court routinely finds protected interests arising out of state statutes and policies that allow much more discretion than whatever discretion is implicit in a probable cause determination. In *Loudermill*, for example, the Court noted that an Ohio statute "plainly" created a property interest in continued public employment, despite the fact that it allowed removal for subjective "incompetency, inefficiency, dishonesty, . . . immoral conduct, insubordination, discourteous treatment . . . or any other failure of good

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Faced with negative inference prisoner liability claims, some courts required particular results. *See id.* Non-prisoner property cases based on positive law do not suffer from the same problems, and need not meet the same test. In this case, the particular result is adequately defined. There can be only one result -- that the precise terms of the protection order are enforced. Whether that is accomplished by means of arrest; retrieving the children; a "step-back" instruction, Pet. Br. 28; or otherwise, is irrelevant.

behavior." 470 U.S. at 538-39 & n.4. The Court expressly acknowledged that the decisionmaker retained "discretion" under the statute, and that the issues raised by *Loudermill* were "subjective." *Id.* at 543-44 & n.9. *See also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11 (1978) (receipt of services from public utility terminable for "good and sufficient cause"); *Bishop*, 426 U.S. at 345 n.8 (finding that public employment was terminable "at will," rather than for cause); *Goss*, 419 U.S. at 573-574 (public education may be suspended for "misconduct"); *Nearing*, 670 P.2d at 142 at n.7 (finding no discretion in similar statute's probable cause requirement).

D. Respondent's Property Interest Is Not Contingent Upon The State's Provision of Private Remedies.

The United States argues that Colorado law cannot be read to provide a property right in enforcement because it does not also provide a private right of action "to enforce the statute against the police officials." U.S. Br. 17 (punctuation marks removed) (quoting *Thompson*, 490 U.S. at 454, 460 (1989). The argument misconstrues *Thompson* and confuses the state's right to define property with its obligation to provide constitutional procedure.

Thompson did not, as the United States suggests (at 17), condition property rights on an ability "to enforce the[] [statute] against the [police] officials," and we are aware of no case that has so held. *Thompson* was a liberty case in which prisoners claimed to have an interest in open visitation stemming from a prison policy memorandum. After concluding that the policies were not mandatory such that they created a legitimate expectation of open visitation (an analytic dismissed by *Sandin*), the Court summarized that no inmate "could reasonably expect to enforce them against the prison officials." *Thompson*, 490 U.S. at 465. The court did

not purport to condition the liberty interest on the availability of procedures to enforce, and lower courts referencing the language have not done so either. *Taylor v. Armontrout*, 894 F.2d 961, 965 (8th Cir. 1989) (finding an "inmate, ... could reasonably expect to enforce [policy] against the prison officials," but not analyzing whether state cause of action existed).[9]

Moreover, a rule requiring a private cause of action or other post-deprivation process as a condition for finding a protected interest cannot be squared with this Court's jurisprudence which clearly indicates otherwise. *See e.g., Loudermill*, 470 U.S. at 541; *Vitek*, 445 U.S. at 491; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). In *Loudermill*, this Court clarified that "[t]he categories of substance and procedure are distinct.... 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty." 470 U.S. at 541. Once the determination is made that state law creates a property interest, "the question remains what process is due," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), but [t]he answer to that question is not to be found in the [state]

[9] Because this Court has not conditioned the existence of protected interests on claimants' ability to enforce statutes against state decisionmakers, the Court need not reach the United States' standing or justiciability arguments. Nonetheless, both arguments fail. On the standing point, the United States cites *Gonzaga* to argue that there must be "rights-creating" language to support a claim, but in that case plaintiff sought to use § 1983 to enforce a federal statute, not to remedy a federal constitutional violation. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002). The justiciability argument focuses on courts' disinclination to review *prosecutorial* discretion, not police discretion. *See LaFave & Israel, supra,* at 625 ("in the eyes of the law, discretion by the prosecutor is considered proper while discretion by the police is with rare exception viewed with disfavor"). This Court has not hesitated to review police conduct. *See e.g., County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (reviewing police discretion).

statute." *Loudermill*, 470 U.S. at 541. Petitioner's argument would negate due process entirely -- the right exists to ensure sufficient due process when the state fails to provide it.

III. RESPONDENT WAS DENIED CONSTITUTIONAL DUE PROCESS, EVEN THOUGH IT COULD EASILY HAVE BEEN PROVIDED.

A. Respondent's Pleas For Enforcement Were Arbitrarily Ignored Without Meaningful Process.

The essence of Respondent's complaint is that Petitioner arbitrarily ignored Respondent without employing *any valid process at all*. *See* PA 126a-127a. Petitioner did not truly engage in an "informal consultation" with Respondent (who was "the principal or only witness available to police at the time"), nor did Petitioner make "an initial enforcement decision" after meaningfully considering her request. U.S. Br. 29. Instead, while going through the motions of responding, Petitioner merely "repeatedly ignored and refused her requests for enforcement." PA 31a. Despite Respondent's five calls in five hours and midnight visit to the police station, Petitioner merely turned her away, telling Respondent that "there was nothing they could do"[10] and to "call back later." Indeed, the Complaint alleges that the Petitioner's police department maintains an "official policy or custom that recklessly disregards" its duty to enforce protection orders. PA 129a.

While it is true that Petitioner repeatedly took Respondent's calls, PA 126a-127a, and that Petitioner

[10] Ptacek, *supra*, at 162 (police often tell women that they "can't do anything" to enforce protection orders or that police action is "waste of time," especially if the abuser is not present); Schecter, *Women & Male Violence* (1982) (police used to tell battered women "[t]here's nothing we can do. It's a family matter").

allowed Respondent to file an incident report, PA 127a, those reflexive responses do not equate with genuine "process." They were mere lipservice.[11] *See* Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence,* 43 Wm. & Mary L. Rev. 1843, 1851 (2002) (describing "call us again" response as common means of ignoring or delaying response to victims of domestic violence); Hoctor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 Cal. L. Rev. 643, 649 (1997) ("Police treatment of domestic abuse calls has traditionally consisted of . . . purposefully delaying response, even for several hours. . ."); *Quincy Court Model Domestic Abuse Program Manual* 17 ("Quincy Manual") (describing infamous case in which police brought victim to police station, spoke with her, and then took her home, only for her abuser to murder her entire family before they took action) ("Quincy Case"). This historic police practice of ignoring and putting off victims of domestic violence is well-recognized,[12] and is precisely why enforcement statutes like Colorado's are mandatory.

B. The *Mathews* Factors Weigh Heavily In Favor Of Requiring Minimal Procedural Safeguards.

The United States correctly notes that "due process is flexible and calls for such procedural protections as the particular situation demands." U.S. Br. 26 (citing *Morrissey*, 408 U.S. at 481). While clearly no *formal* hearing can be expected in this context, if the police are to afford holders of

[11] *Cf.* Gwinn & O'Dell, *Stopping the Violence: The Role of the Police Officer and Prosecutor,* 20 W. St. U. L. Rev. 298, 300 (1993) ("The handling of domestic violence cases in San Diego in early 1986 was similar to most of the country. Police Officers were required to write reports but little else was mandated or encouraged.").

[12] IACP Concept Paper (App. C 13a) ("In the past, law enforcement dispatchers have ignored domestic calls or assigned them low priority.")

protection orders "the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation removed), then they must offer something more than the "sham" response provided to Respondent. PA 42a.

The Court below held that due process in these circumstances requires the following: an objective, reasoned consideration of the complaint; an assessment of probable cause; a decision; and if adverse, notice to the complainant of the decision and the reasons. PA 40a-42a.[13] These minimal steps appropriately balance the factors that this Court outlined in *Mathews*: (i) the private interest at stake; (ii) the risk of an erroneous deprivation and probable value of additional safeguards; and (iii) the government's interest.

The Private Interest At Stake: The weight of the first *Mathews* factor is overwhelming, and heavily favors at least *some* process. *See Mathews*, 424 U.S. at 340 (calling first factor "crucial" in welfare context where denial "may deprive an eligible recipient of the very means by which to live while he waits"). Protective orders can quite literally save lives, if enforced.[14] NNEDV Br. 26-29. Once enforcement is denied,

[13] The *en banc* court specifically echoed the statutory requirements that officers determine 1) whether a valid order exists and 2) whether probable cause exists to find there is a violation and that the restrained party had valid notice of the order. The *en banc* court then added that if the officer finds that "mandatory" enforcement is not appropriate, the officer must notify the person seeking enforcement of the decision and reasons underlying it. PA 40a. The court emphasized that police consideration must be "bona fide" and the request be "seriously entertained." PA 42a.

[14] "Most women seeking protective orders have experienced physical assault, threats of harm or death, sexual abuse, threats with a weapon, stalking, and harassment, or assaults on their children. Violations of protective orders are both common and often associated with significant danger to the victim. . . . Overlooking the threat posed by protection order violations is unwise and dangerous, [retired Lieutenant Mark Wynn of the

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the damage caused to the victim may be permanent -- no amount of retroactive relief will remedy her loss. *See Mathews*, 424 U.S. at 341 (weighing risk that denial "may deprive the eligible recipient of the very means by which to live while he waits").[15]

The Risk of Erroneous Deprivation: This factor requires the Court to assess the extent to which the procedures actually employed by the state risk an erroneous decision. *Id.* Insofar as the Complaint alleges that Petitioner ignored Respondent's repeated pleas for assistance and gave no serious consideration to enforcement of her order, PA 129a (pattern and practice), the risk of error implicit in these non-"procedures" is unquestionably substantial. Indeed, the United States acknowledges that police need to consider information from the holder of a protection order in order to do their job. *See* U.S. Br. 29. Without good faith consideration of that information, error is virtually assured.[16]

Nashville Police Department] believes." National Center for Victims of Crime, *Newsletter of the Stalking Resource Center*, Fall 2004 ("NCVC").

[15] Because time is often of the essence, the United States' suggestion that alternative remedies like contempt can reduce the private interest at stake is misguided. Moreover, the suggestion that police may need to "monitor the situation" has no bearing here, where the police actually failed either to meet Respondent as promised, or even to "monitor" the location where her estranged husband had taken the children. PA 126a-127a.

[16] The United States implies that the outcome here is "exceptional" and the "risk of error" in the "generality of cases" is low. U.S. Br. 28. This suggestion mistakenly treats the "risk of error" factor as measuring the degree of harm rather than the risk of mistakes from existing procedures. It is also unsupportable as a factual matter. Police failures to protect battered women, resulting in murders and attempted murders of mothers and/or children, are legion. *See e.g.*, *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) ($2.3 million jury award); *Quincy Case*, *supra*. These killings and maimings are *predictable*; indeed, because they are so likely, courts enter protection orders to attempt to stop them.

Probable Value of Additional Safeguards: The procedures adopted by the *en banc* court of appeals are minimal, requiring no more than that which police are ordinarily expected to do in virtually any case: listen, give objective and unbiased consideration to the facts, make a decision about probable cause, and inform the complainant. *See* PA 40-41a. But they are targeted to the precise "nature of the relevant inquiry," giving this *Mathews* factor great weight. *Mathews*, 424 U.S. at 343.

Moreover, contrary to the United States' claim (at 29) that any required procedures would have no value because there are no facts in dispute, the simple process articulated by the Court below would cure the problems presented in this case: By requiring objective and serious consideration of the complaint, it would forestall the "sham" and "cruel deception," PA 42a, that occurred here. By requiring a decision to be made and expressly communicated to the complainant, it would require the police to treat her complaint as a potential crime and to assess probable cause. And by requiring the explanation for a decision against enforcement, it would allow the complainant to correct any misapprehensions and potentially seek supervisory review.[17]

The United States asserts that an informal oral consultation between the police and the caller "would be sufficient and would provide the fundamental requisite of due process of law: the opportunity to be heard." U.S. Br. 29 (punctuation marks and citations omitted). This suggests that

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[17] In this case the police apparently dismissed Mr. Gonzales's dangerousness, and, if the Petitioner's brief is any indication, may have misread the restraining order. *See* Pet. Br. 2, 7, 7 n.1, 7 n.2 (asserting these events occurred during a "mid-week" dinner visit). This error is contrary to the express allegations of the Complaint. Had the police explained their refusal to assist, Respondent might have been able to correct their mistakes or appeal to a supervisor.

the United States concedes the core process we assert is due. Assuming that the information gathered is actually given good faith, reasoned consideration, and not utterly ignored, we agree that it (along with a probable cause determination and notice to the victim) would be constitutionally sufficient. The core difference here, of course, is a factual one: Respondent alleges that the police ignored her, did not meaningfully consider her complaint, and therefore never even made a probable cause decision. PA 129a.[18]

The Government's Interest: The third *Mathews* factor also weighs strongly in favor of requiring minimal procedures. The state of Colorado has already "voted with its feet," by adopting the mandatory enforcement statute. This decision is utterly rational. Numerous jurisdictions have found that proactive police enforcement dramatically reduces domestic homicides,[19] significantly benefiting both law enforcement

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[18] The United States argues that this Court should consider the "generality of cases," and that the "usual" process of "informally receiving information" from the complainant is not "inherently faulty." U.S. Br. 29. But the issue before this Court is not whether the "usual process" is faulty, but whether Respondent herself received due process in *this* case. If she did not, the Tenth Circuit was right, and the United States' protestation that "the usual process" is constitutional only serves to undermine its claim that affirmance here would drastically disrupt police operations. Though the United States implies that the "process" in this case met its description of "usual practice," i.e., informal consultation, etc., U.S. Br. 29, the Complaint alleges the opposite.

[19] *Cf.* Hart, *Arrest: What's the Big Deal*, 3 Wm. & Mary J. Women & L. 207, 212-214 (1997) ("The assertion that police intervention equals homicide/crime prevention is now supported by hard numbers") (noting more than 50% drop in homicides due to domestic violence in San Diego; Newport News; Tulsa; Nashville; and Quincy, Mass.); N.C. Gov's Crime Comm'n, Violence Against Women Comm., *Domestic Violence: Best Practices for Law Enforcement Response* iii (1998) <www.gcc.state.nc.us/pubs/dvproto.pdf> ("N.C. Gov's Comm'n") (reporting 59% homicide reduction in San Diego in three years; drop in Tulsa from 16 to one in

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and society. *Mathews*, 424 U.S. at 347-48. A proactive police response is in states' interests because it deters future violence and reduces repeat domestic violence calls, thereby reducing the massive costs that future domestic violence incidents would impose.[20] Moreover, a proactive police policy benefits *the police* in numerous ways, such as reducing the drain on police resources by deterring repeat offenders, enhancing police safety, and simplifying and clarifying police obligations.[21]

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three years; and only one domestic violence related homicide in over 11 years in Quincy).

[20] Wanless, *supra*, at 563 (reduction in domestic violence from proactive police response will produce cost saving to state); *cf.* Br. of *Amici Curiae* Frmr. Colo. Legis. Peggy Kerns, et al., at 12-14 (detailing costs of domestic violence and citing empirical study indicating that prevention and criminal enforcement measures have reduced these costs); Letter from Lt. Healey, San Diego Family Justice Ctr., to Joan Meier (Feb. 7, 2005) ("Healey Letter") (pro-arrest policy reduced repeat calls for service and reduced out-of-service time for officers, by providing more victim assistance, more collaboration with prosecutors and stronger sanctions).

[21] *Cf. e.g.*, Colo. Coalition Against Domestic Violence, *Law Enforcement Training Manual* 2-2 (2d ed. 2003) <www.ccadv.org/publications/law_enforcement_manual_11-03.pdf> ("Colo. Coalition Manual") (one goal is to "[r]educe the demand for police resources by reducing recidivism in domestic violence cases"); Domestic Violence Coordinating Council, *DVCC Model Law Enforcement Domestic Violence Policy* <www.dvcc.state.de.us/1model.html> ("Del. DVCC") (policy seeks to "promote officer safety; deter future incidents of violence, etc."); Ky. Justice Cabinet & Gov's Council on Domestic Violence, *Model Domestic Violence Law Enforcement Policy* <gocadvs.ky.gov/lawpolcy.htm> ("Ky. Gov's Council") ("policy is designed to provide officers and support personnel with clear definitions, direction, and guidelines for providing and promoting a consistent, effective response to domestic violence crime"); *Model Protocol for Police Response to Domestic Violence* 2 (2002) <www.wjin.net/Pubs/2998.pdf> ("Pa. Protocol") (among goals are "[t]o promote officer safety by ensuring that officers are as fully prepared as possible to respond to domestic calls; and ... [t]o help reduce police resources consumed in responding to domestic violence by

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The Pennsylvania experience is instructive. There, in the face of a clear message from the courts that its permissive arrest statute did not create an entitlement to procedural due process for deprivation of that benefit, the legislature *responded by enacting a mandatory arrest statute, to ensure that the constitutional entitlement would be established. See Hynson v. City of Chester*, 731 F. Supp. 1236, 1240 (E.D. Pa. 1990) (no entitlement to arrest under original statute); *Coffman*, 739 F. Supp. at 264 (while the PFAA is not mandatory, plaintiff's protection order sufficiently mandated arrest to support Due Process claim); *Burella*, 2003 U.S. Dist. LEXIS 25170 (holding that revised, now mandatory, statute created entitlement). *See* 23 Pa. Cons. Stat. Ann. § 6113(a), (b) (2003) (amended in 1994 to include "shall arrest" language); *see also Taylor v. Ledbetter*, 818 F.2d 791, 800 (11th Cir. 1987) (*en banc*) ("Since the child's claim under *Roth* is a procedural due process claim, the state of Georgia may alter its statutes and ordinances in such a way as to change or eliminate the expectation on which this child had the right to rely."), *cert. denied*, 489 U.S. 1065 (1989).

Petitioner's and its Amici's hyperbolic claims that the *en banc* court's minimal safeguards would "disrupt law enforcement ... by forcing officials to modify enforcement priorities" or to delay their response to "riots or natural disasters," Pet. Br. 39-40; U.S. Br. 23-24, and by requiring "police to devote disproportionate resources" to domestic violence are frankly absurd and bear no relation to the police

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reducing the number of police interventions required for any particular household"); N.H. Gov's Comm'n on Domestic Violence, *Law Enforcement: A Model for Police Response to Domestic Violence Cases* <doj.nh.gov/victim/pdf /dvlaw.pdf> ("N.H. Gov's Comm'n") ("[t]o increase the effectiveness of police responses to domestic violence incidents thereby reducing the resources consumed by the need to repeatedly respond to the same household"); *Healey Letter*, *supra*.

practices with which we are familiar.[22] Police practices adopted all over the country and championed by leading national law enforcement organizations such as the IACP and the United States Department of Justice require much more of police than the bedrock minima articulated here. For instance, most such guidelines recommend or mandate arrest where there is probable cause to believe a crime has been committed;[23] require police to locate the suspect when he is

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[22] Despite the government's somewhat alarmist admonition (at 25) that these procedures will wreak havoc with police priorities, rarely will there be "more serious crimes" which should warrant higher priority than this one, in which three children were murdered by their estranged father.

[23] Colo. Spring Police Dep't, *General Order 510: Domestic Disturbances* (2003) ("Colorado Order 510") (App. D 33a) (arrest required for domestic violence crimes); Colo. Coalition Manual, *supra*, § 2-23 (arrest preferred); Del. DVCC, *supra*, at D.1 (arrest mandated for felonies; preferred for misdemeanors); DOJ Off. of Violence Against Women & IACP, *Protecting Victims of Domestic Violence: A Law Enforcement Officer's Guide to Enforcing Orders of Protection Nationwide* (App. E 44a) ("DOJ/IACP Guide") (arrest preferred for crimes or violations of order where required by State); Domestic Violence State Coordinating Council, *Tennessee Domestic Abuse Benchbook* 7 VI.A (1997) <www.tcadsv.org/downloads.html> ("Tenn. Model Policy") (arrest preferred); Exec. Off. of Pub. Safety, *Massachusetts Pol'y for Law Enforcement Response to Domestic Violence* 9-10 (2002) ("Mass. Policy") (mandated for violations of protection orders; preferred where probable cause); IACP Policy (App. B 9a) (strongly recommending arrest when probable cause and requiring explanation for non-arrest); Ky. Gov's Council, *supra* (arrest preferred); Law Enforcement Comm. of the San Diego Domestic Violence Council, *Domestic Violence Law Enforcement Protocol* <www.sandiegodvcouncil.org/sddvc.html> ("San Diego Protocol") (arrest mandated for felonies; preferred for misdemeanor); Malefyt, et al., *Promising Practices: Improving the Crim. Just. Sys. Response to Violence Against Women* 71 (1998) ("Promising Practices") (arrest preferred where probable cause); Malefyt, et al., *Assessing the Just. Sys. Response to Violence Against Women: A Tool for Law Enforcement, Prosecution and the Courts to Use in Developing Effective Responses* 14-36 (1998) ("Malefyt") (describing model police programs in ten cities); *id.* at 10 (arrest expected if probable cause); N.H. Gov's Comm'n, *supra*, at 4 (police should arrest where probable cause exists); Quincy Manual,

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absent;[24] and require police to file a detailed investigation report, regardless of whether an arrest is made.[25] Notably, because violators of protection orders present a heightened danger to their victims, and because it is critical to enforce protection orders, those models that address violations of protection orders agree that when non-contact provisions of a protective order are violated, *arrest is required*.[26] Many

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supra, at 22-24 (arrest mandated for violations of restraining orders; preferred for other domestic violence crimes); N.J. Div. of Crim. Just., *Domestic Violence: Guidelines on Police Response Procs. in Domestic Violence Cases* 3 (1994) <www.state.nj.us/lps/dcj/agguide/dvpolrsp.htm> (must arrest if signs of injury or if no signs of injury but probable cause to arrest); NY. Off. for the Prevention of Domestic Violence, *Model Law Enforcement Pol'y Language* 4-5 (1995) <purl.org/ net/nysl/nysdocs/ 39046885> ("NY Model Policy") (arrest shall be made where allowed by law); N.C. Gov's Comm'n, *supra*, at 4 (police should arrest); *Pa. Protocol*, *supra*, at 1, 6 (police should arrest when possible); Police Chief's Ass'n of Santa Clara County, *Domestic Violence Protocol for Law Enforcement* 13 (2003) <www.growing.com/nonviolent/protocol/ pdfiles/dvp_4law.pdf> ("Santa Clara Protocol") (officer's responsibility to arrest where possible); St. Louis County Sheriff's Office's Safety & Accountability Audit, *Domestic Violence Handbook & Training Guide* (2001) ("St. Louis Sheriff's Audit"); Will Cnty State Atty's Off., *Domestic Violence Protocol* 2 <www.willcountyillinois.com/statesatty/ protocols2.htm> ("Will Cnty Protocol") (officers can make an arrest if probable cause exists); Wisc. DOJ Crime Victims Council, *Model Domestic Violence Policies and Procedures* 5 (2002) < www.doj.state.wi.us/cvs/documents/DAR/ModelDVPolicies.pdf> ("Wisc. DOJ Model Policy") (officer *must* arrest).

[24] Mass. Policy, *supra*, at 10; *Promising Practices*, *supra*, at 12; N.C. Gov's Comm'n, *supra*, at 7; Santa Clara Protocol, *supra*, at 28; St. Louis Sheriff's Audit, *supra*, at 7; Wisc. DOJ Model Policy, *supra*, at 7.

[25] Mass. Policy, *supra*, at 16; Malefyt, *supra*, at 11, 15, 22, 32 (Appleton, Seattle, Virginia Beach Police Dep'ts); Promising Practices, *supra*, 83; Santa Clara Protocol, *supra*, at 15; Will Cnty Protocol, *supra*, at 2.

[26] Colo. Order 510 (App. D 39a); Colorado Spring General Order 612 (App. F 49a); Colo. Coalition Manual, *supra*, at 6-11; Ky. Gov's Council, *supra*, at 5; Mass. Policy, *supra*, at 9-10; N.H. Gov's Comm'n, *supra*, at II.B.; N.Y. Model Policy, *supra*, at VI.D.3; N.C. Gov's Comm'n, *supra*,

(continued...)

policies go even further, requiring, for example, that if no arrest is made, the investigation report must justify that failure;[27] that officers search for the suspect in any location the victim mentions;[28] that police document probable cause determinations;[29] that police *not* consider numerous listed factors in determining probable cause;[30] that officers prepare written reports on any allegation of a violation of a protective order,[31] and that supervisors specifically review investigation reports and probable cause determination.[32]

Thus, while common police protocols require arrest, thorough probable cause assessments, detailed reporting, and follow-up when a suspect is absent, the Tenth Circuit's view of the Due Process Clause requires only reasoned consideration of the complaint, assessment of probable cause, and notice of the decision. The constitutionally sufficient

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at IV.A; Quincy Manual, *supra*, at 22; San Diego Protocol, *supra*; Tenn. Model Policy, *supra*, at VI.A.3; Santa Clara Protocol, *supra*, at 27; St. Louis Sheriff's Audit, *supra*, at I.A.; NCVC, *supra*, at 2 (due to "danger to victims," police should carefully track violations and consistently arrest violators"); Will Cnty Protocol, *supra*, at 7.B.5. *See also* DOJ/IACP Guide (App. E 46a) (officers should arrest for order violations).

[27] IACP Policy (App. B 8a) ("officers shall fully explain the basis for their non-arrest decision"); Malefyt, *supra*, at 11, 15, 22 (Appleton and Seattle Police Dep'ts); N.C. Gov's Comm'n, *supra*, at 4 (reasons must be "compelling" to justify no arrest); N.H. Gov's Comm'n, *supra*, at 6-7 (same); Pa. Protocol, *supra*, at 1, 6 (requiring "detailed explanation"); Tenn. Model Policy, *supra*, at XII.B; Will Cnty Protocol, *supra*, at 2; Wisc. DOJ Model Policy, *supra*, at 7 (requiring officers to document why no arrest).

[28] N.C. Gov's Comm'n, *supra*, at 7.

[29] Malefyt, *supra*, at 22 (Seattle).

[30] Promising Practices, *supra*, at 73 (Santa Clara & St. Petersburg).

[31] *Id.* at 20 (Santa Clara).

[32] Mass. Policy, *supra*, at 19; Promising Practices, *supra*, at 74; Will Cnty Protocol, *supra*, at 2.

procedures adopted by the *en banc* court are minimal – virtually trivial – in comparison to standard domestic violence police practices. It cannot be that all of these law enforcement organizations are adopting policies that compromise police priorities and their ability to respond to other critical needs. Rather, the procedures adopted below simply require routine police practice to be extended to battered women and their children.[33]

CONCLUSION

For the foregoing reasons, amici request that this Court affirm the decision of the Court of Appeals for the Tenth Circuit and remand this case for further proceedings below.

Respectfully submitted,

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Dated February 10, 2005

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[33] "[D]omestic violence . . . disproportionately victimizes women and policies of underenforcement seem clearly motivated by archaic notions of patriarchal family structure and family privacy. . . . At its heart, the attempt to make the law and state actors more responsive to the needs of battered women is about equal protection in the broadest sense." 106 Harv. L. Rev. 1551, 1570 (1993). *See also* NCADV Br. at I. This history and context of discrimination and inequality can and should inform this Court's determination of the procedural due process claim in this case. *See Burson v. Freeman*, 504 U.S. 191, 213 (1992) (considering race discrimination in rejecting First Amendment concerns); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (rejecting states' right to regulate economic activity where it prohibited a boycott "designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself").

APPENDIX A

Colo. Rev. Stat. § 14-10-108 (2004)

(1) In a proceeding for dissolution of marriage, legal separation, the allocation of parental responsibilities, or declaration of invalidity of marriage or a proceeding for disposition of property, maintenance, or support following dissolution of the marriage, either party may move for temporary payment of debts, use of property, maintenance, parental responsibilities, support of a child of the marriage entitled to support, or payment of attorney fees. The motion may be supported by an affidavit setting forth the factual basis for the motion and the amounts requested.

* * * * *

(2) As a part of a motion of such temporary orders or by an independent motion accompanied by an affidavit, either party may request the court to issue a temporary order:

(a) Restraining any party from transferring, encumbering, concealing, or in any way disposing of any property, except in the usual course of business or for the necessities of life, and, if so restrained, requiring him to notify the moving party of any proposed extraordinary expenditures and to account to the court for all extraordinary expenditures made after the order is issued;

(b) Enjoining a party from molesting or disturbing the peace of the other party or of any child;

(c) Excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm would otherwise result.

* * * * *

Colo. Rev. Stat. § 14-10-109 (2004)

The duties of peace officers enforcing orders issued pursuant to section 14-10-107 or 14-10-108 shall be in accordance with section 18-6-803.5, C.R.S., and any rules adopted by the Colorado supreme court pursuant to said section.

* * * * *

Colo. Rev. Stat. § 18-6-803.5 (2004)

(1) A person commits the crime of violation of a protection order if such person contacts, harasses, injures, intimidates, molests, threatens, or touches any protected person or enters or remains on premises or comes within a specified distance of a protected person or premises or violates any other provision of a protection order to protect the protected person from imminent danger to life or health, and such conduct is prohibited by a protection order, after such person has been personally served with any such order or otherwise has acquired from the court actual knowledge of the contents of any such order.

(1.5) As used in this section:

(a) "Protected person" means the person or persons identified in the protection order as the person or persons for whose benefit the protection order was issued.

(a.5) (I) "Protection order" means any order that prohibits the restrained person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any protected person, or from entering or remaining on premises, or from coming within a specified distance of a protected person or premises or any other provision to

protect the protected person from imminent danger to life or health, that is issued by a court of this state or a municipal court, and that is issued pursuant to:

* * * * *

(B) Sections 14-4-101 to 14-4-105, C.R.S., section 14-10-107, C.R.S., section 14-10-108, C.R.S., or section 19-3-316, C.R.S., as those sections existed prior to July 1, 2004;

* * * * *

(II) For purposes of this section only, "protection order" includes any order that amends, modifies, supplements, or supersedes the initial protection order. "Protection order" also includes any restraining order entered prior to July 1, 2003, and any foreign protection order as defined in section 13-14-104, C.R.S.

* * * * *

(c) "Restrained person" means the person identified in the order as the person prohibited from doing the specified act or acts.

(2) (a) Violation of a protection order is a class 2 misdemeanor; except that, if the restrained person has previously been convicted of violating this section or a former version of this section or an analogous municipal ordinance, or if the protection order is issued pursuant to section 18-1-1001, the violation is a class 1 misdemeanor.

(a.5) A second or subsequent violation of a protection order is an extraordinary risk crime that is subject to the modified sentencing range specified in section 18-1.3-501 (3).

* * * * *

(3) (a) Whenever a protection order is issued, the protected person shall be provided with a copy of such order. A peace officer shall use every reasonable means to enforce a protection order.

(b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:

(I) The restrained person has violated or attempted to violate any provision of a protection order; and

(II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order.

(c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid protection order whether or not there is a record of the protection order in the registry.

APPENDIX B

IACP Model Policy

Effective Date: Revised: October 1, 1996
Subject: Domestic Violence
Special Instructions:
Reevaluation Date: October 1, 1997

I. PURPOSE

It is the purpose of this policy to prescribe preliminary courses of action police officers should take in response to domestic violence incidents.

II. POLICY

This agency maintains that the nature and seriousness of crimes committed between family/household members are not mitigated solely because of the relationships or living arrangements of those involved. It is the policy of this agency that domestic violence be treated with the same consideration as violence in other enforcement contexts and, consistent with this policy, that officers combine the use of appropriate community services with enforcement of the law to (1) break the cycle of domestic violence by preventing future incidents or reducing the frequency and/or seriousness of such incidents, (2) protect victims of domestic violence and provide them with support, and (3) promote officer safety when dealing with domestic abuse situations.

III. DEFINITIONS

Family/household member includes persons who fit into one of the following categories:

1. Are legally married to one another;
2. Were formerly married to one another;
3. Are related by blood;
4. Are related by marriage;
5. Have a child in common;
6. Are living together, who have lived together, or who have a dating relationship; or
7. Are specified as such by state law.

Domestic violence occurs where a family or household member commits or attempts to commit the following types of offenses against another:

1. Bodily injury or threat of imminent bodily injury;
2. Sexual battery;
3. Physical restraint;
4. A property crime directed at the victim;
5. Violation of a court protection order or similar court injunction; or
6. Death.

IV. DISPATCHER'S PROCEDURES

The dispatcher who receives a domestic violence call can provide the responding officers with vital information that could save the victim's and the officer's lives. The dispatcher will give a domestic violence call the same priority as any other life-threatening call and will, whenever possible, dispatch at least two officers to every incident.

A. In addition to information normally gathered, an effort should be made to determine and relay the following to responding officers:

1. Whether the suspect is present and, if not, the suspect's description and possible whereabouts;

2. Whether weapons are involved;
3. Whether anyone has been injured;
4. Whether the offender is under the influence of drugs or alcohol;
5. Whether there are children present;
6. Whether the victim has a current protective or restraining order; and
7. Whether there is a history of domestic violence complaints at that location.

B. Dispatchers shall not cancel police response to a domestic violence complaint based solely on a follow-up call from the residence requesting such cancellation. However, the dispatcher shall advise the officers of the complainant's request.

V. RESPONDING OFFICER PROCEDURES

A. On-Scene Investigation

When responding to a family violence call, the officers shall

1. Physically separate parties involved in domestic violence.
2. Restore order by gaining control of the situation.
3. Take control of all weapons used or threatened to be used in the crime.
4. Assess the need for medical attention and call for medical assistance if indicated.
5. Interview all parties.
6. Collect and record evidence and, where appropriate, take color photographs of injuries and property damage.
7. Complete appropriate crime or incident reports necessary to fully document the officer's

response, whether or not a crime was committed or an arrest made.

8. Give the victim a copy of the incident report number.
9. If the offender has left the scene and a crime has been committed, the officers will do the following:

   a. Search the immediate area if potentially worthwhile;
   b. Obtain information from victims and witnesses as to where the offender might be;
   c. Seek an arrest warrant, and
   d. Refer the matter to the investigative unit.

B. Arrest

1. Officers should make an arrest when probable cause and legal authority exist to do so. Field release and issuance of a citation are not permitted in domestic violence cases when grounds for an arrest are present.
2. If an arrest is not made where probable cause exists, officers shall fully explain the basis for their non-arrest decision.
3. The officers should emphasize to the victim and the offender that the criminal action is being initiated by the state and not the victim.

C. Victim Assistance/Crime Prevention

Many victims of domestic violence feel trapped in violent relationships because they are unaware that domestic violence is a crime or that resources are available to help them. Also, the offenders may have

threatened further violence if the victim attempts to leave or seek assistance. Therefore, officers are required to provide the following assistance to victims, batterers, and, where appropriate, the children of these individuals:

1. Advise all parties about the criminal nature of family violence, its potential for escalation, and that help is available;
2. Secure medical treatment for victims;
3. Ensure the safety of the children;
4. Remain on the scene until satisfied that there is no threat to the victim;
5. Remain on the scene to preserve the peace if one person needs to remove personal (not joint) property;
6. Provide the victim with a referral information packet for legal or social assistance and support;
7. Where necessary, transport the victim to an available shelter or suitable alternative safe haven; and
8. If children need to be removed from the home, contact a supervisor.

This project was supported by Grant No. 93-DD-CX-K009 awarded by the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice. The Assistant Attorney General, Office of Justice Programs, coordinates the activities of the following program offices and bureaus: the Bureau of Justice Assistance, the Bureau of Justice Statistics, National Institute of Justice, Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in this document are those of the author and do not represent the official position or policies of the United States Department

of Justice or the International Association of Chiefs of Police.

Every effort has been made by the IACP National Law Enforcement Policy Center staff and advisory board to ensure that this model policy incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no "model" policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of federal court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities, among other factors.

APPENDIX C

IACP National Law Enforcement Policy Center

Domestic Violence

Concepts and Issues Paper

Originally Published: August 1, 1990
Revised: October 1, 1996

I. INTRODUCTION

A. Purpose of Document

This paper was designed to accompany the Model Policy on Domestic Violence established by the IACP National Law Enforcement Policy Center. This paper provides essential background material and supporting documentation to provide greater understanding of the developmental philosophy and implementation requirements for the model policy. This material will be of value to law enforcement executives in their efforts to tailor the model to the requirements and circumstances of their community and their law enforcement agency.

B. Definitions

The legal definitions of family or household members differ somewhat from state to state. The model policy includes in its definition persons who are or were married; are related by blood or marriage; have a child in common; are living together or have lived together; or have a dating relationship, whether that be heterosexual or homosexual in nature.

The term family violence generally includes violent behaviors against children, spouses, parents, or other current

or former household members. The term domestic violence in this paper is used interchangeably with the terms wife beating, battering, and spouse abuse, but these terms also apply to other than legally married couples. Violence between ex-spouses or others with present or past intimate relationships can be considered in the same category. It is widely recognized that while some husbands are abused, the vast majority of domestic violence victims are women.

The model policy states that domestic violence "occurs where a family or household member commits or attempts to commit the following types of offenses against another:

1. Bodily injury or fear of imminent bodily injury;
2. Sexual assault;
3. Interference with freedom of movement;
4. A property crime directed at the victim;
5. Violation of a court order; or
6. Criminal trespass."

Thus, domestic violence cases may include but are not limited to the crimes of homicide, rape, assault, battery, reckless endangerment, burglary, criminal trespass, malicious mischief, kidnapping, unlawful imprisonment, and others.

II. BACKGROUND

A. From Private Matter to Crime

By the turn of the 20th century, most states had outlawed wife beating.[1] Nevertheless, Americans have been reluctant to give up the view that family matters, including violence, should be resolved by family members, not public agencies.

[1]Del Martin, *Battered Wives*, New York, Simon and Schuster, Inc., 1976.

Many victims[2] as well as police have shared this view. In the past, law enforcement dispatchers have ignored domestic calls or assigned them low priority.[3] 0fficers have failed to make arrests even when serious injuries were inflicted,[4] and have treated as misdemeanors many assaults involving extensive physical harm and weapons.[5]

With greater public understanding of domestic violence in the 1970s came increased pressure on law enforcement to intervene. Policies changed, and officer responsibilities became more extensive. However, policies were still not focused on arresting lawbreakers. Rather, officers were instructed to restore order, separate and calm down the involved parties, and sometimes send the suspect away to "cool off." Some officers also attempted to mediate the situation and made referrals to social service agencies.[6] But batterers were seldom arrested and tried in criminal court for assault or other crimes.

[2]Patrick A. Langan and Christopher A. Innes, *Preventing Domestic Violence Against Women*, Bureau of Justice Statistics, Special Report, August 1986. According to the National Crime Survey for 1978-82, 49 percent of women who did not report domestic violence incidents to the police claimed they did not call because they considered the incident a private matter.

[3]Michael Steinman, "Anticipating Rank and File Police Reactions to Arrest Policies Regarding Spouse Abuse," *Criminal Justice Research Bulletin*, Vol. 4, No. 3, 1988, p. 1. Also see Eva S. Buzawa, "Police Officer Response to Domestic Violence Legislation in Michigan," *Journal of Police Science and Administration*, December 1982, p. 415.

[4]*Ibid.*

[5]Barbara E. Smith, *Non-Stranger Violence: The Criminal Court's Response*, Washington, D.C., National Institute of Justice, 1983, p. 89.

[6]Morton Bard, *Training Police as Specialists in Family Crisis Intervention*, Washington, D.C., Government Printing Office, 1970.

Only in the past decade has there been widespread public insistence that violent incidents in the home be treated as crimes. The model policy reflects this view in the first sentence:

> *The nature and seriousness of crimes committed between family or household members are not mitigated because of the relationships or living arrangements of those involved.*

In short, domestic violence can no longer hide behind soft language. It is not a "quarrel," "spat," or "dispute." It involves crimes that demand a law enforcement response, including arrest where probable cause and legal authority exist.

B. Factors Influencing Policy Changes

Four main factors have caused law enforcement agencies throughout the country to change their policies and require arrests in domestic violence cases: persistent lobbying and information campaigns by battered women and their advocates; changes in state laws; research conducted in cooperation with law enforcement agencies; and court decisions determining police liability for failure to protect domestic violence victims.

In the mid-1970s, battered women collaborated with researchers and other professionals to expose the extent and nature of domestic violence.[7] It became evident there was a critical need to protect and develop services for battered

[7]Erin Pizzey, *Scream Quietly or the Neighbors Will Hear*, Short Hills, New Jersey: Ridley Enslow, 1977 (published in England in 1974); Del Martin, *Battered Wives*, New York: Simon and Schuster, Inc., 1976 (updated in 1983); and Lenore Walker, *The Battered Woman*, New York: Harper and Row, 1979.

women. Many communities established emergency shelters or networks of safe houses, along with programs to provide counseling, legal advice, financial planning services, and in some jurisdictions, counseling for batterers.

Until recently, officers in most states did not have the legal authority to make misdemeanor arrests in domestic situations unless they witnessed the crime. Since many initial acts of domestic violence are misdemeanor assaults, opportunities to prevent future, and probably more violent, incidents were limited. Coalitions of service providers and former victims began to press hard for changes in the criminal justice system's response to spouse abuse. They insisted that state laws and police policies emphasize the need to arrest suspects in domestic violence cases. Now, the majority of states permit police to make arrests for simple assault in domestic cases based on probable cause, without having to witness the incident.

In the early 1980s, the results of research in the Minneapolis, Minnesota, Police Department also supported the adoption of policies requiring or encouraging arrests. The research design of the Minneapolis Domestic Violence Experiment applied only to misdemeanor domestic assaults. The police had been recently empowered by state law to make arrests in these cases, although they were not required to do so. For the experiment, a lottery selection determined which of three responses police officers would use for each incident: arrest the suspect; send the suspect from the scene for eight hours; or provide some form of advice, which could include mediation.

The study found that, according to the victims, only 19 percent of the suspects who were arrested repeated the violence within the next six months, compared to 37 percent

of those who received advice, and 33 percent of those who were separated.[8]

The researchers also reported a number of flaws in the experimental design and its implementations and encouraged replication of the experiment in other cities.[9] However, they were confident enough in the results to state that "the preponderance of evidence in the Minneapolis study strongly suggests that the police should use arrest in most domestic violence cases."[10] By 1986, nearly half of police departments in cities with more than 100,000 residents had policies prescribing the arrest of domestic violence suspects, compared to only 10 percent in 1984.[11]

In the late 1980s, replications of the Minneapolis experiment were undertaken in six cities.[12] While the full data from one site was never made public, the findings from these replication experiments differ from those in Minneapolis. The Omaha researchers concluded that

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[8]Lawrence W. Sherman and Richard A. Berk, *The Minneapolis Domestic Violence Experiment*, Washington, D.C., Police Foundation Reports, April 1984, p.6.

[9]Sherman and Berk, "The Specific Deterrent Effects of Arrest for Domestic Assault," *American Sociological Review,* Vol. 49, No.2, April 1984.

[10]Sherman and Berk, *Police Foundation Reports, op. cit.*, p.2.

[11]E.G. Cohn and Lawrence W. Sherman, "Police Policy on Domestic Violence, 1986" paper presented to annual meeting of the Academy of Criminal Justice Sciences, St. Louis, Missouri, 1987.

[12]The replications, sponsored by the National Institute of Justice, were undertaken in Omaha, Nebraska; Atlanta, Georgia; Milwaukee, Wisconsin; Colorado Springs, Colorado; Charlotte, North Carolina; and Dade County, Florida.

arresting suspects had no more effect on deterring future conflict than did separating or counseling them.[13]

Differences in various conditions in Minneapolis and Omaha (and the other replication sites) will need further consideration. For example, all arrested suspects in Minneapolis spent at least eight hours in jail. In Omaha, some suspects spent less than eight hours from booking to the posting of bond.

It is also important to note that in Omaha, although arrest by itself did not deter continued conflict, neither were the victims whose spouses were arrested in any greater danger of continued violence.[14] This finding supports the concept that laws and policies favoring arrest are not likely to encourage further victim harm, and at the same time make a strong public statement about society's unwillingness to tolerate domestic crimes.

However, since arrest alone may not deter continued domestic violence, researchers and policy makers must consider which additional strategies are most effective. As discussed later, the model policy includes procedures for providing victims with protection, referral sources, and information.

Several significant court cases have also influenced law enforcement to adopt arrest policies. In 1985, a federal jury awarded Tracy Thurman $2.3 million and found that the city of Torrington, Connecticut, and 24 of its police officers violated Mrs. Thurman's 14th Amendment right to equal

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[13]Franklyn W. Dunford, David Huizinga and Delbert S. Elliott, "The Role of Arrest in Domestic Assault: The Omaha Police Experiment," *Criminology, Vol.28, No.2, May 1990, p. 204.*

[14]Dunford, et. al., p.204.

protection.[15] For eight months, Mrs. Thurman had notified the police repeatedly of her husband's threats on her life. She attempted unsuccessfully to file complaints against him. After one assault, he was convicted of a breach of the peace, and she obtained a protective order. Still, the police failed to arrest him after promising several times to do so. Finally, Mr. Thurman brutally stabbed her.

The court held that the police based a policy of not arresting abusive men on an impermissible stereotype that husbands may beat their wives. The court stated that

> *[a] man is not allowed to physically abuse or endanger a woman merely because he is her husband. Concomitantly, a police officer may not knowingly refrain from interference in such violence, and may not automatically decline to make an arrest simply because the assault and his victim are married to each other. Such inaction on the part of the officer is a denial of the equal protection of the laws.*[16]

Other courts have ruled that the police may be held liable for failure to protect if a "special relationship" has been taken on by the police department or imposed by statute. Josephine Sorichetti was separated from her husband, Frank, and had obtained a protective order forbidding him to assault, menace, or endanger her. When she brought their daughter to him for a weekend visit, he made threats on both their lives, which Mrs. Sorichetti reported to the police. When he failed to return their daughter, Mrs. Sorichetti called the police, but was told to wait. Meanwhile, Mr. Sorichetti stabbed his daughter with a screwdriver, fork, and

[15] *Thurman* v. *City of Torrington*, 595 F. Supp 1521 (1984).
[16] *Id.* at 1528.

knife, and tried to saw off her leg. He was later convicted of attempted murder.

The New York Court of Appeals in Sorichetti v. New York[17] said a municipality cannot be held liable for failure to provide adequate protection absent a special relationship, but that such a special relationship existed in this case because of

> *(1) the order of protection, (2) the police department's knowledge of Frank Sorichetti's violent history, gained through and verified both by its actual dealings with him, the existence of the order of protection and its knowledge of the specific situation in which the infant had been placed; (3) its response to Josephine Sorichetti's pleas for assistance on the day of the assault, and (4) Mrs. Sorichetti's reasonable expectation of police protection.*[18]

In *Bruno* v. *Codd*[19], 12 battered women brought an action against the New York City Police Department for failure to respond to requests for protection, "presumably because of reluctance on the part of the police to intervene in what they reflexively characterized as 'domestic disputes' rather than criminal offenses."[20] A consent judgment was negotiated, resulting in major revisions in the department's policy. The police agreed thereafter to arrest the husband whenever there was reasonable cause to believe a felony had been committed against the wife or a protective order had been violated; remain at the scene to prevent other offenses; and provide the wife other assistance. Further, police supervisors revised

[17] *Sorichetti* v. *City of New York*, 492 N.Y.S. 2s 59 (Ct. App. 1985).
[18] *Id.* at 59
[19] *Bruno* v. *Codd*, 419 N.Y.S.2d 901 (1979).
[20] *Id.* at 905.

their disciplinary and other regulations to ensure these policies were carried out.

C. Dispelling Myths and Stereotypes

There should no longer be any doubt that spouse abuse occurs frequently in our society. Further, the injuries sustained are serious. According to National Crime Survey (NCS) data for 1978 to 1982, each year about 2.1 million women were victims of domestic violence. On average, the women were victimized three times each. Nearly half of these estimated 3.4 million incidents were not brought to the attention of the police.[21] According to the Bureau of Justice Statistics, about a third of the incidents in the NCS survey would be classified as felonies (aggravated assault, rape, robbery). The remaining two-thirds would be considered "simple assaults." However, the data suggest that about half of the simple-assault victims sustain injuries that are far more serious than commonly believed.[22]

Further, the severity of the violence in a family is likely to escalate over time. One study found that in Kansas City, in 85 percent of the domestic homicides, the police had been to the home at least once before the murder. In 50 percent of the cases, they had been there at least five times.[23]

One common misconception has been that domestic violence is predominantly a problem among the poor. Poor victims do account for more reported domestic violence. However, many experts believe this is simply because they cannot afford private counseling and other resources

[21] Langan and Innes, p.1.
[22] *Ibid.*
[23] Police Foundation, *Domestic Violence and the Police: Studies in Detroit and Kansas City,* Washington, DC, 1977.

available to middle- and upper-income persons.[24] Nor is domestic violence a "blue-collar" problem. Batterers include doctors, lawyers, business executives, government officials, police officers, and clergymen, all occupations. Similarly, no assumptions about battering should be based on racial or ethnic stereotypes.

In fact, it is not possible to construct a profile of a batterer that would be of any immediate value to a responding officer. Some, but certainly not all, abusers have alcohol or drug problems, but treatment for addiction alone is no guarantee that the abusiveness will stop.[25] Very few batterers are psychotic. Some suspects may appear angry and disheveled when the officer arrives, but in other situations, the man behaves calmly while the woman seems hysterical, leading officers to assume incorrectly that the reported abuse or possibility of future danger have been exaggerated.

Nevertheless, batterers do have common characteristics that are important to understand if we are to stop blaming the victim for the violence. Batterers are likely to deny or minimize their behaviors. They often blame others for their problems or abusiveness (Ashe drove me to it@). They tend to be jealous and possessive; in the extreme, they may constantly follow their spouses around and closely monitor their activities. In addition to inflicting repeated physical harm on their spouses, they exhibit "a cohesive pattern of coercive controls that include verbal abuse, threats, psychological manipulation, sexual coercion and control over economic resources."[26] This pattern also includes

[24] Gail A. Goolkasian, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies,* National Institute of Justice, May 1986, p.3.
[25] David Adams, "Identifying the Assaultive Husband in Court: You Be the Judge," *Response*, Vol. 13, No.1, 1990, p.15.
[26] Adams, p.14.

periods of remorse and loving behavior, giving some victims hope that the abuser will change.

Law enforcement training on spouse abuse often includes descriptions of this "cycle of violence," in which relatively calm periods are followed by still more, and often more devastating, assaults. It is also important to stress that financial dependence on the abuser, religious beliefs, and cultural pressures to keep the family intact are all factors that influence the victim to stay. She may also be unaware of the social support systems and legal remedies available to her.

The result for the victim can be an immobilizing fear. Police often express frustration about the victim's reluctance to press charges against the abuser. Yet, in many ways the victim's experience can be compared to that of a hostage or prisoner of war.[27] She is attacked verbally, beaten, isolated from friends and family, and threatened with more severe beatings should she try to escape or call for help. To help reduce the possibility of the suspect's retaliating against the victim, the model policy requires the arresting officer to emphasize that the criminal action is being initiated by the state and not the victim.

III. POLICY AND MANAGEMENT ISSUES

A. Officer Compliance and Training

Historically, officers have valued the freedom to use their discretion on duty. Although some jurisdictions report high officer compliance once domestic violence arrest policies are in place, some resistance to a mandatory policy should be

[27]Gail A. Goolkasian, "Confronting Domestic Violence: The Role of Criminal Court judges," Washington, DC, National Institute of Justice, *Research in Brief*, November 1986, p.2.

anticipated. Even the Minneapolis experiment ran into difficulties because of officers' reluctance to use the proscribed responses. Early indications are that the departments with greatest compliance are those operating in an arena where system-wide support is in place (prosecutors, courts, treatment services, and others). Law enforcement administrators must determine how they will get officers to arrest all or most suspects, and provide for the training and support needed to make quality arrests that succeed in accomplishing overall goals.[28]

A "preferred" rather than "mandatory" arrest policy may pose a lesser threat to officer discretion. However, since arresting suspects calls for using traditional tactics, officers may more readily accept a mandatory arrest policy than an experimental approach.[29] Further, it may provide the specific guidance that officers appear to be seeking for handling domestic calls.[30]

Also arguing in favor of a mandatory policy are increasing community expectations that police will treat spouse abuse as seriously as any stranger-to-stranger crime. Failure to do so risks not only court action but a more general loss of agency credibility in the community. Domestic violence victims clearly have high expectations of the police. On the National Crime Survey, the most common reasons given for reporting a domestic crime were to keep it

[28]Steinman, p.2.

[29]Steinman, p.4.

[30]Ronald Dolon, James Hendricks and M. Steven Meagher, "Police Practices and Attitudes Toward Domestic Violence," *Journal of Police Science and Administration*, Vol.14.,No.3, 1986, pp. 192-197.

from happening again (37 percent) and to "prevent this incident from happening" (24 percent).[31]

In general, the department must assess and deal with existing officer skills and attitudes when it designs training to support domestic violence policies. Do officers still view wife beating as a private matter? Have they been exposed to crisis intervention training? Will they have reasonable assurance that the rest of the criminal justice system will back them up after an arrest is made?

Many experts note that how arrests are made may be as important as whether they are made. In the Minneapolis experiment, victims' feelings that the police listened to them were more closely associated with reducing rearrest than the offender's background and many other variables.[32] Officers need to be aware of the subtle ways their language can affect outcomes.[33] Does the officer imply to the victim or suspect that these cases seldom go anywhere? Or are victims and suspects, as the model policy requires, being fully informed of the criminal nature of the act and the legal remedies available?

The fact that law enforcement officers may have personal experience in domestic violence, either as an abuser or the victim of domestic abuse, should not be overlooked. Such experience will almost certainly affect their views regarding domestic violence enforcement. Law enforcement agencies should be cognizant of this fact and be prepared to offer

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[31] Langan and Innes, p.3.

[32] Sherman and Berk, *Police Foundation Reports, op. cit.*, p.6.

[33] Gail A. Goolkasian, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies,* Washington, DC, National Institute of Justice, May 1986, p.24.

intervention strategies for affected employees, or disciplinary or criminal sanctions where appropriate.

B. Officer Safety

One of the three main elements of the model policy relates to promoting officer safety. Officers should be "fully prepared to respond to and effectively deal with domestic violence calls for service."

In the past, the risk of officer death in responding to domestic calls has been overstated. This is largely because of the way the FBI grouped the "disturbance calls" data in its annual report on officers killed and assaulted. Until 1982, the "disturbance" category included bar fights, general disturbances, and citizens brandishing firearms, in addition to domestic situations. When domestic calls were separated from other disturbances, the data on officer deaths from 1973 through 1984 revealed 69 deaths associated with domestic disturbances, compared to 151 for other disturbances. During the same period, 210 deaths were associated with robberies, 162 with traffic situations, and 75 with burglaries; and 65 officers died accidentally because of their own actions or the actions of other officers.[34]

Of course, this does not mean that domestic calls are not dangerous, since assaults and injuries are always a possibility. But training in handling domestic calls should put the risks in proper perspective. The model policy states that dispatchers should give domestic violence calls the same priority as other life-threatening calls, and recommends sending at least two officers to every incident.

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[34] Joel Garner and Elizabeth Clemmer, "Danger to Police in Domestic Disturbances-A New Look," National Institute of Justice, *Research in Brief*, November 1986.

C. Victim Assistance and Crime Prevention

Preventing future violent incidents is clearly one of the goals of victims who report domestic crimes, and is one of the main purposes of the model policy. The policy combines its recommendations on arrest with several specific "victim assistance/crime prevention" measures. These include steps to meet safety and medical needs and to preserve the peace. In addition, the policy calls for advising the parties of the criminal nature of domestic violence and its potential for escalation, and requires provision of legal and social service referrals. Many departments rely primarily on the responding officers to provide these initial advisory and referral services. The officers' training, expertise, and attitudes will be important factors in providing effective responses.

Some departments have teamed with social service and mental health providers to take an outreach approach. For example, the Bellevue, Washington, Police Department notes that it "is not sufficient to merely refer (domestic violence victims) to make a self-initiated call; most often, they simply will not do it." The department requires officers to report every case, regardless of whether there is cause for arrest, and code it "DV." The report is sent to a local social service agency for prompt follow-up, which includes contacting the victim about available services and safe houses.[35]

Similarly, in New York City the police department works with the Victim Services Agency to provide telephone follow-up on domestic incidents. Where multiple incidents have been reported, unannounced home visits are made. In Phoenix, mental health professionals and trained volunteers form two-person family stress teams to assist officers. The

[35]D.P. Van Blaricom, "Domestic Violence," *Police Chief,* June 1985, p.64.

teams use a radio-equipped, unmarked car during the busiest weekend hours and provide on-site crisis intervention and counseling at the officer's request.[36]

D. Reporting Requirements

The model policy includes the requirement that officers "complete appropriate crime or incident reports . . . whether or not a crime was committed or an arrest made." Clearly, outreach efforts like those noted above would not be possible without conscientious reporting.

There are other benefits to recording all incidents and identifying them properly as domestic cases. Accurate statistics can enable the police to describe the extent of the problem and help gain support for needed resources. These records can also improve officer preparation and safety. For example, in Albuquerque, information on civil and criminal domestic violations are available to field units through the department's computer-aided dispatch system. Officers can obtain information on past problems at a specific address as they proceed to answer a call.

IV. CONCLUSIONS

In 1984, the Attorney General's Task Force on Family Violence concluded that the "legal response to family violence must be guided by the nature of the abusive act, not the relationship between the victim and the abuser."[37] The model policy supports this view. Acts of domestic violence are crimes. Law enforcement officers should make arrests

[36]Maryann Conrad and Thomas M. Jahn, "The Family Stress Team Approach in Curbin Domestic Violence," *Police Chief*, June 1985, p. 67.
[37]Attorney General's Task Force on Family Violence, *Final Report*, Washington, D.C., U.S. Department of Justice, 1984, p.4.

whenever probable cause and legal authority exist. Support for this view is widespread, based on the experience of advocates for battered women, current social science research, changes in state laws, and the courts.

Nevertheless, the model policy also recognizes that arrests alone may not deter future acts of violence. It recommends additional measures to provide victims with information and protection and encourages referrals for needed services. Arrest is viewed as only one tool in an officer's "tool bag" of possible responses to instances of domestic violence.

Among those who advocate a comprehensive approach to addressing domestic violence is Dr. Lawrence Sherman, lead researcher for the original domestic violence experiments in Minneapolis and a recognized expert on the subject. In an exhaustive assessment of the research to date,[38] including the

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[38] Lawrence Sherman, *Policing Domestic Violence: Experiments and Dilemmas*, New York: The Free Press, 1992.

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Every effort has been made by the IACP National Law Enforcement Policy Center staff and advisory board to ensure that this model policy incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no "model" policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of federal court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective

(continued...)

available findings of the six replication experiments previously mentioned, Dr. Sherman draws several conclusions and recommendations that deserve attention here.

First, of the six cities in the replication study, only Omaha issued warrants to offenders who were not present when officers arrived, and this was the only effective innovation among the cities involved in the experiment. Those served with warrants had less than half the repeat violence of those who did not. This finding is largely the basis for the model policy's recommendation that arrest warrants be issued for offenders who have fled the scene of actionable domestic violence prior to police arrival.

Notwithstanding the foregoing, the results of domestic violence research generally and the replication experiments in particular show that the impact of arrest varies by jurisdiction due primarily to differences in population composition. For example, analysis of the data suggests that unemployed suspects become more violent if arrested, but that employed suspects do not. According to Sherman, this consistent pattern found among the cities in the replication experiments supports the position that criminal punishment depends largely upon a suspect's "stake in conformity" that is, how much he has to lose from the social consequences of his arrest. Unemployed and unmarried individuals experience the greatest escalation in violence after arrest, a

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bargaining agreements that must be considered. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities among other factors.

pattern that was the most consistent finding among the domestic violence replication experiments, while those with jobs and families may be more responsive to arrest or the threat of arrest. Arrest is also only a deterrent in cases where it is perceived as "legitimate." The values of a subculture of the community and the neighborhood social context (e.g. saving face in front of peers by defying authority and the arrest) are factors that mitigate the perceived legitimacy of arrests for domestic violence. In fact, subcultural values may in some cases even support or condone the use of violence within the family as an acceptable means of dealing with problems. As such, the capacity of arrest to change the behavior of domestic violence perpetrators is substantially diminished or even counterproductive.

Unfortunately, these findings create a dilemma for police and their governing jurisdictions that mandate arrest in all domestic violence cases. On the one hand, mandatory arrest policies and laws may help protect working-class women, but on the other hand they may also cause greater harm than would otherwise be the case for many of the poor and disenfranchised within those same jurisdictions. In many cases, those individuals who are the most frequent offenders (and the most deserving of arrest in the minds of many) are the individuals who are often least responsive to arrest as a punishment or deterrent.

The impact of arrest is also uncertain in other ways. Three-hour arrests in Milwaukee reduced the immediate danger to spouses, but over the course of a year, violence increased among the same suspects who were arrested. The question becomes in many situations whether to risk additional violence in the short run by not making an arrest or to risk more danger of violence later if an arrest is made.

In the wake of these and other dilemmas and unsure outcomes, Sherman makes several salient points. First, he recommends that states repeal mandatory arrest laws and replace them with arrest as an option for police officers. Arrest is not appropriate for all persons and may even be counter-productive in many cases, as has been noted. Arrest should be regarded as only one tactic that is available to police in dealing with domestic violence. A policy that encourages arrest where probable cause exists is probably more appropriate, and officers should be given reasonable discretion in these situations to use other remedies. At the same time, for purposes of supervision, officers should also be required to justify their decisions if they do not arrest in situations where probable cause to arrest exists.

Second, instead of mandatory arrest, Sherman recommends that each police agency develop its own list of approved options that officers may use at their discretion in accordance with policy and training. The IACP National Law Enforcement Policy Center has long maintained that policy must meet the particular circumstances of police agencies and their communities. The highly diverse nature of communities within states and regions makes it essential that police agencies tailor their domestic violence and other policies to match the needs and capabilities of their jurisdictions. Along with this discretion, however, agencies must provide training for officers that examines the nature and causes of domestic violence and the various options and community resources that may be brought to bear on such problems along with the potential impact of those options.

Third, special units and policies should focus on chronically violent couples. A limited number of couples and addresses produce the vast majority of domestic violence complaints. In Minneapolis, for example, over half of the domestic violence calls for service originated from just 3

percent of locations in the city. Identifying and targeting both offenders and locations are important steps in managing the police response to domestic violence. The use of specially trained personnel may be one approach to dealing with targeted locations and offenders.

Finally, until recently most police agencies have responded to domestic violence as individual incidents rather than identifying, analyzing, and systematically addressing problem patterns in targeted locations. The implications for managing police resources and developing response options and prevention strategies through overall problem solving and community-oriented policing styles appear obvious, but is beyond the scope of this document to explore. Given the immense law enforcement and social problem created by domestic violence and our seeming inability to make meaningful progress toward its control, police agencies should be encouraged to pursue controlled experimentation rather than become entrenched in a single-minded focus on arrest as the only useful response.

APPENDIX D

Colorado Spring Police Department, *General Order 510: Domestic Disturbances* (2003).

Colorado Spring Police Department
General Order 510
Section 5: Special Populations
Domestic Disturbances

Active date: **11/13/2003**
Supersedes date: **9/24/2002**

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.03 Discussion

Domestic disturbance calls for service are serious matters requiring appropriate handling by police officers, particularly when there is probable cause that crimes against persons have been committed. Failure to take the appropriate action often leads to later personal crimes involving the same parties and to repeated calls for police service. State statute requires that peace officers arrest any suspect when probable cause exists that an offense involving domestic violence has been committed.

.04 Policy

In domestic disturbance calls, when probable cause is present for crimes relating to domestic violence, officers shall arrest the suspect. The overriding concern is taking appropriate action that assures the protection and safety of the victim and other potential victims. When probable cause is present, the officer will arrest the suspect regardless of the expressed wishes of the victim, and whether or not the victim agrees to

sign a complaint. All persons arrested for offenses related to Domestic Violence, both felony and misdemeanor, will be booked into secure detention and required to post bond on the charges.

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.10 Arrest of Domestic Violence Assailants

If the officer finds probable cause that a crime has been committed, within the definition of domestic violence, suspect and victim are or have been involved in an intimate relationship, the officer shall arrest the suspect without undue delay. All persons arrested on offenses relating to Domestic Violence, including felonies, misdemeanors, and City ordinance violations, will be booked into secure detention, CJC or Spring Creek, as appropriate, and required to post bond.

When visible injuries are present, officers are required to document them with photographs, whenever possible. Any other evidence shall be collected to the degree it is reasonably possible, and preserved in accordance with existing policy.

All Domestic Violence initial investigations and arrests will be documented on a Domestic Violence (DV) Form, as follows:

- If possible, the officer will obtain the victim's signature on the "complaining witness" line on the face of the Domestic Violence Form. The refusal of a victim to sign the complaint does not eliminate the requirement that the suspect be arrested if probable cause is established.

- The victim will be asked to complete and sign a written Victim's Statement, as well as the face of the form, but shall not be required to do so. The fact that a victim declines to sign a complaint, or complete a statement, does not alter the obligations of the officer to make an arrest, based on probable cause. In the event the victim does not complete a written statement, probable cause for the arrest must be clearly established in the investigating officer's written statement.

- If the victim is transported to the hospital or indicates that he/she will seek medical attention, the "Authorization to Release Medical Information to the District Attorney/Law Enforcement" form shall be signed, by the victim, and forwarded to the appropriate Investigations unit. On older DV packets, this release is a signature line on the back of the last page.

- The victim of domestic violence shall be advised that he/she has the right to be notified when the suspect is released from jail. If the victim requests notification, the officer shall obtain the victim's signature on the "Victim Notification" line, located on the back of the last page.

- Officers will provide the victim with the blue Victim Copy of the DV packet, incidental to their initial on-scene investigation, whether or not a suspect has been arrested or a pickup placed for a suspect at large. The original Victim Copy should not be returned to CSPD files, nor should it be left with the original DV packet when a pickup is placed.

Misdemeanor Arrest--If the officer finds probable cause that a misdemeanor crime has been committed, within the definition of domestic violence, the officer shall complete a DV Form Summons and Complaint as follows:

- Charges shall be written into County Court rather than Municipal Court, unless the only violation for which probable cause exists is a Municipal Code violation having no corresponding State charge.

- The officer will write "Post Bond" in the defendant's signature block of the DV Summons & Complaint. When an arrest is made, the defendant's copy will be left with booking personnel when the suspect is booked into CJC or Spring Creek. If the form being used still contains a Personal Recognizance Bond and No Contact Order section, the officer will draw a line through the entire section and will not otherwise use it.

- When officers making a misdemeanor DV arrest determine that during the same criminal episode the suspect has committed non-DV misdemeanor offenses, against other victims with whom they have no intimate relationship, the charges should be written on separate summonses, having the same court date and cross referenced to each other. The DV charges relating to the original victim will be written on a DV form, used as a Summons & Complaint, and the other charges written on a regular, non-DV summons that identifies the victim of those offenses. If an offense report number is needed, the same number will be used on both summonses. The suspect must be booked into CJC on the DV misdemeanors, however, may be served

and released on the non-DV charges at the officer's discretion.

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.11 Domestic Violence Investigations

Officers should remain cognizant of the fact that cases involving allegations of domestic violence may receive increased scrutiny from supervisors, prosecutors, judges, and community groups. For this reason, officers should make reasonable efforts to conduct as thorough an investigation as is practicable, under the circumstances, even in cases involving relatively minor criminal allegations. Officers should attempt to personally interview victims and suspects, as well as identify and interview witnesses, whenever practical. When visible injuries are present, officers shall photograph them whenever possible, and should carefully describe them in the narrative portion of their report or the DV packet. A statement from the attending physician should be included in the officer's report, if the victim receives medical treatment incidental to the initial investigation. Officers should review the victim's written statement, if any, for thoroughness and elements of the crime alleged, and should document their own observations, including those facts that serve to corroborate or refute statements of involved parties, on the Summons Narrative, the old form, or PC Affidavit on the new form portion of the DV packet or in offense report supplements. Officers may, at their discretion, require a case report if they feel it will facilitate the investigation or thorough documentation of details in supplemental reports.

Arrests for events that did not occur within an officer's presence must be based on probable cause, regardless of the insistence or reluctance of a party to sign a complaint. It is

the responsibility of investigating officers and supervisors to determine if probable cause exists for an arrest; when it does, the facts supporting it must be clearly documented by the officer, the victim, or both. When probable cause cannot be established, officers shall not take a signed complaint, make an arrest, or file criminal charges, even if a complainant demands to sign a complaint. When officers are uncertain whether or not probable cause exists, supervisory guidance should be obtained. Colorado statute stipulates that an officer is not required to arrest both parties merely because both claim to be victims, nor does it require an officer to arrest either party when the officer believes that no probable cause exists.

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.12 Domestic Violence Pickup Procedure

If the suspect cannot be located prior to going off-shift, the officer shall complete a pickup in accordance with SOP P1-23 and deliver it along with the following paperwork to Records and ID. Copies of the DV paperwork may be faxed to records and ID and the original paperwork described below sent via interoffice mail.

Misdemeanors: The completed DV Form Summons & Complaint, with an original probable cause affidavit. The handwritten Summons Narrative or PC Affidavit portion on the back of Page 1 of the DV Packet may be used as the PC Affidavit in misdemeanor cases, so long as it is legible and contains sufficient detail to establish probable cause. When so used, this original page will be signed by the officer affiant and notarized.

Felonies: A completed DV Form, used as a felony face sheet, with an original PC affidavit and Information for

Preliminary Procedure attached. Felony PC Affidavits should not be handwritten, but will be typed on a separate page. The original must be signed and notarized. A photocopy of the PC Affidavit will be attached to each copy of the packet.

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.50 Restraining Order Violations

Officers are required to make a custodial arrest of any person who violates a valid Restraining Order issued in this, or any other state, if probable cause exists that the restrained person has been properly served with or received actual notice of the order, and has violated any provision of the order. In determining probable cause, officers shall use information concerning active restraining orders obtained through the CBI Central Registry maintained on the CCIC computer system, as part of their basis for determining whether probable cause of a violation exists. However, officers should exercise extreme caution if basing their probable cause for an arrest exclusively upon information from the registry, and shall make every reasonable effort to confirm through other sources that the restraining order is valid and active. This can be accomplished through viewing a printed copy of the order provided by the victim, through admissions from the suspect that he/she is aware of the order's validity, through interviews with third parties who were witnesses to its service, by contacting the issuing court, or other investigative means. …

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Cash Or Surety Bond - Before Domestic Violence suspects are released from jail, a Mandatory Restraining Order (MRO) prohibiting the arrestee from harassing or

intimidating the victim will be issued by the Court or by jail personnel acting on the Court's order, which will remain in effect until final disposition of the criminal case. In some instances No Contact provisions may be added to the MRO, which will expire three judicial days from the time of signature (when the defendant is released from jail). If an officer receives a call for service from a victim who claims the suspect has violated the MRO or No Contact provisions of a bond issued from jail, the officer must verify the order through personal inspection, the Central Registry, or by calling CJC Intake to verify the defendant's bond and the expiration date of the No Contact provision. If the violation is prior to the No Contact expiration, probable cause exists to arrest the suspect for:

18-6-803.5 C.R.S. Violation of Restraining Order
18-8-212 C.R.S. Violation of Bail Bond Conditions

* * * * *

- Colorado Springs Police Department

APPENDIX E

United States Department of Justice, Office of Violence Against Women & International Association of Chiefs of Police, *Protecting Victims of Domestic Violence: A Law Enforcement Officer's Guide to Enforcing Orders of Protection Nationwide* (visited Feb. 7, 2005) <www.vaw.umn.edu/documents/protesct/protect.html>.

This project was supported by a Cooperative Agreement awarded by the Violence Against Women Grants Office, Office of Justice Programs, U.S. Department of Justice, to the International Association of Chiefs of Police.

Publication Date: Not Available, *available at* http://www.vaw.umn.edu/documents/protect/protect.html#id2633419

What is full faith and credit?

- In 1994, Congress enacted the Violence Against Women Act (VAWA) directing jurisdictions 1 to give full faith and credit to valid orders of protection issued by other jurisdictions. 18 U.S.C. § 2265.

Simply stated, *full faith and credit* requires that:

- Valid orders of protection must be enforced to protect victims of domestic violence wherever a violation of an order occurs, regardless of where the order was issued.

What does this mean for victims?

- Abused persons who are granted orders of protection can now call upon law enforcement to protect them and to take all appropriate action against abusers nationwide.

What does this mean for abusers?

- The abuser is bound by the terms and conditions of the order of protection and may be arrested and charged with violating the order and committing other substantive crimes wherever the abuser violates a valid order. It does not make any difference where the order was granted. The abuser must be arrested for a violation of an order of protection if the law of the jurisdiction where the violation occurred requires an arrest.

What does this mean for law enforcement?

- If an order of protection is valid in the issuing jurisdiction, it must be enforced in every other jurisdiction. Some jurisdictions grant orders:
  - to victims who might not be eligible for orders in the enforcing jurisdiction
  - for periods of time longer than authorized in the enforcing jurisdiction
  - containing directives against abusers that might not be available in the enforcing jurisdiction

A responding officer **MUST ENFORCE** the terms and conditions of the order as written. Officers are not required to know the laws of the issuing jurisdiction in order to enforce orders of protection. Officers in the enforcing jurisdiction must comply with all laws, policies, and procedures of their own jurisdiction concerning violation of orders of protection, such as mandatory arrest and victim notification, if applicable.

Why is Full Faith and Credit Important?

- When victims of domestic violence leave, they and their children are at an increased risk of violence. Abusers

who cross jurisdictions in pursuit of victims may be engaged in stalking, which is a significant risk indicator of life-threatening violence.

* * * * *

What is an Order of Protection?

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Determining the Terms and Conditions of an Order of Protection

- After providing for victim and officer safety, it is essential that the officer read the order in its entirety. An order may state something in one paragraph and specify exceptions in another. For example, an order may state that the abuser is to have "no contact" with a victim in one paragraph, and then in another state that contact may occur to arrange for visitation with the children. In this case, if the abuser contacted the victim for any reason other than to arrange for visitation, the order was violated.

* * * * *

What Enforcement Action should be Taken?

Immediate Action

- Ensure the safety of all involved
- Seek medical attention, if necessary
- Safeguard the victim from further abuse
- Secure and protect the crime scene
- Seek voluntary surrender of firearms for safekeeping purposes
- Seize firearms subjects to State, territorial, local, or tribal prohibitions

- Identify whether an order of protection has been violated
- Evaluate the validity and enforceability of the order
- Arrest for violation of the order where required by the enforcing jurisdiction
- Arrest for any other criminal offenses
- Seek an arrest warrant, when required, related to the criminal conduct if the abuser is not at the scene
- Attempt to locate and arrest the abuser

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Helpful Interventions

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Assessing Lethality

Factors to consider in determining serious injury/lethality potential:

- Threats of homicide/suicides
- History of domestic violence and violent criminal conduct
- Stalking
- Depression or other mental illness
- Obsessive attachment to victim
- Separation of parties
- Drug or alcohol involvement
- Possession or access to weapons
- Abuse of pets
- Destruction of victim's property
- Access to victim and victim's family and other supporters

* * * * *

Questions Frequently asked about Full Faith and Credit

What if the abuser has violated the order of protection and then fled the scene?

- Determine if abuser's actions warrant arrest
- Follow departmental procedure for dealing with a criminal suspect who has fled the scene
- Conduct safety planning and refer victim to appropriate court or advocacy agency

* * * * *

Enforcing Orders of Protection

Federal law requires that all valid orders of protection granted by a court of any jurisdiction be recognized and enforced as if they were issued by a court where the violation occurred.

Responding Officer's Procedures

A responding officer must enforce the terms and conditions of the order as written by the issuing jurisdiction.

The order of protection is presumed valid if it has the correct names of the parties, has not expired, and is signed by an issuing authority. It should be enforced pursuant to departmental policy and the laws of the enforcing jurisdiction.

Immediate Action

If the named respondent committed an offense under the criminal laws in the officer's jurisdiction and/or violated the court order, the officer should:

- Arrest respondent pursuant to the enforcing jurisdiction's law and departmental policy
- Initiate criminal complaint against respondent for the crime(s) committed and for violation of the order

Office of the Attorney General Washington, D.C. 20530

"Through its full faith and credit provision, the Violence Against Women Act is designed to ensure that valid protection orders are enforced in each and every jurisdiction in America. The statute affords important and often lifesaving protection for victims of domestic violence who cross state or tribal lines--whether to go to work, visit relatives, or seek safe haven from abuse. Law enforcement officers play a crucial role in ensuring that protection orders are enforced so that a victim is safe no matter where in the country she goes. I hope that you will find this booklet helpful in your efforts to stop domestic violence and save lives."

Janet Reno
Attorney General of the United States

International Association of Chiefs of Police

To America's Law Enforcement Officers:

Protecting victims of domestic violence is a critical part of our job. The actions you take in these situations can clearly save lives. Orders of protection are issued to ensure the safety of victims of domestic violence. We need to enforce these orders to the best of our abilities. The "full faith and credit" component of the 1994 Violence Against Women Act requires law enforcement officers to enforce valid orders across the boundaries of states, tribes and territories. Once an order of protection is issued by a jurisdiction, it is

enforceable in any other jurisdiction in the United States . Both the Attorney General and the IACP are deeply concerned about domestic violence. This booklet is an excellent primer on orders of protection and full faith and credit. I urge you to read it--and act on it.

Bobby D. Moody
IACP President

APPENDIX F

Colorado Spring Police Department, *General Order 612: Domestic Disturbances* (2003) .

Colorado Spring Police Department
General Order 612
Section 6: Enforcement of Criminal Laws
Restraining Orders

Active date: **9/26/2002**
Supersedes date: **9/24/2002**

.04 Policy

If any officer has reasonable grounds to believe that the subject named in an active Restraining Order has violated that order, the officer shall take the appropriate action described in this directive. Service of Civil Restraining Orders shall be done as described in Paragraph .12 below.

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.10 Enforcement of Restraining Orders

Enforcement of all restraining orders shall be in accordance with section 18-6-803.5, CRS, Violation of Restraining Order, and any rules adopted by the Colorado supreme court pursuant to said section.

A person commits the crime of violation of a restraining order if such person contacts, harasses, injures, intimidates, molests, threatens, or touches any protected person, or enters or remains on premises, or comes within a specified distance of a protected person or premises, and such conduct is prohibited by a restraining order, after such person has been personally served with any such order or otherwise has acquired from the court actual knowledge of the contents of any such order.

Permanent Or Temporary Retraining Orders And EPO's:

If any officer has probable cause to believe that the subject named in an active Temporary or Permanent Restraining Order or Emergency Protection Order has violated or attempted to violate that order as described above and the restrained person has been properly served with a copy of the restraining order or the restrained person has received actual notice of the existence and substance of such order, the officer shall arrest according to procedure. The arrested person shall be removed from the scene of the arrest and shall be taken to the Criminal Justice Center for booking. The arrested person will be booked into jail on a Summons and Complaint for 18-6-803.5 C.R.S. Violation of Restraining Order. Any person violating a restraining order issued pursuant to cases involving domestic violence as defined in 18-6-800.3 .C.R.S. shall be booked into jail on a Domestic Violence Form Summons and Complaint.

In determining probable cause, officers shall use information concerning active restraining orders obtained through the CBI Central Registry maintained on the CCIC computer system as part of their basis for determining whether probable cause of a violation exists. However, officers should not base their probable cause for an arrest exclusively upon information from the registry, and shall make every reasonable effort to confirm through other sources that the restraining order is valid and active.

Note: As is the case with any Court order, a restraining order may be modified or terminated only by the Court. The parties to the order do not have the authority to modify or terminate the order themselves. The fact that the victim may have "invited" the suspect to violate the restraining order does not alter the fact that the order has been violated and the offender shall be arrested.

- *Colorado Springs Police Department*